SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1969

No. 1046

EDMOND J. HAMILTON and JOHN L. DATENHOFF,

Appellants,

versus

JOHN J. McKEITHEN, GOVERNOR OF THE STATE OF LOUISIANA,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF LOUISIANA

JURISDICTIONAL STATEMENT ON BEHALF OF EDMOND J. HAMILTON and JOHN L. DATENHOFF, APPELLANTS

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JURISDICTIONAL STATEMENT

Appellants appeal from the final judgment and decision of the Supreme Court of the State of Louisiana entered in this suit on the 8th day of October, 1969, which set aside and reversed the judgment of the Nineteenth Judicial District Court for the State of Louisiana in and for the Parish of East Baton Rouge. Appellants submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial federal question is presented.

OPINIONS BELOW

The opinion of the trial court (R. V1. 1, P. 38) is unreported, but is printed in the appendix hereto. The opinion of the Supreme Court of Louisiana (R. V1. 2, P. 128) is reported at _____ La. _____, 226 So.(2d) 494, and is also set forth in the appendix hereto.

JURISDICTION

This suit was filed by two residents, citizens and taxpayers of the Lake Charles Harbor and Terminal District against the Governor of the State of Louisiana seeking to have Article XIV, Section 30.2(b) of the Constitution of the State of Louisiana declared illegal and unconstitutional under the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution, and seeking to enjoin the Governor from filling a vacancy existing on the Board of Commissioners of the District under the procedure set out in that constitutional provision. (R. V1. 1, P. 4) The trial court declared the provision unconstitutional, and the defendant and intervenors appealed to the Supreme Court of Louisiana. The Supreme Court of Louisiana, the highest court of the State of Louisiana, reversed the trial court and held that the constitutional provision in question was valid. Articles 591 through 597, inclusive, of the Louisiana Code of Civil Procedure authorize the filing of class actions. The right of the plaintiff to prosecute the suit is not contested.

The Supreme Court of the State of Louisiana initially rendered its decision on the 9th day of June, 1969. (R. V1. 2, P. 128) Application for rehearing was timely filed by the present appellants on the 20th day of June, 1969 (R. V1. 2,

P. 142), and said application for rehearing suspended the finality of the decision of the Louisiana Supreme Court until that court denied the application for rehearing on the 8th day of October, 1969. Louisiana Code of Civil Procedure, Articles 2166, 2167.

Notice of appeal to the Supreme Court of the United States was timely filed by appellant in the Supreme Court of the State of Louisiana, on the 10th day of December, 1969. (R. V1. 2, P. 188)

The jurisdiction of the Supreme Court of the United States to review this decision by appeal is conferred by Title 28, U.S. Code Annotated, Section 1257(2), which provides that final judgments or decisions of the highest court of a state in which a decision could be had may be reviewed by the Supreme Court by appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity. The following decisions sustain the jurisdiction of the Supreme Court of the United States to review the judgment of the Louisiana Supreme Court on direct appeal in this case:

Reynolds v. Sims, 377 U.S. 533, 84 S.Ct. 1362 (1964);

Avery v. Midland County, Texas, et al, 390 U.S. 474, 88 S.Ct. 1114 (1968);

Kramer v. Union Free School District, _____ U.S. _____, 89 S.Ct. 1886 (1969);

Cipriano v. City of Houma, et al, _____U.S._____, 89 S.Ct. 1897 (1969).

The provision of the Louisiana Constitution, the validity of which is attacked, Article XIV, Section 30.2(b) of the Louisiana Constitution of 1921, is printed in the appendix hereto.

QUESTION PRESENTED

The following question is presented by the present appeal:

Whether or not the method of appointment to the membership of the Board of Commissioners of the Lake Charles Harbor and Terminal District as provided by Section 30.2(b) of Article XIV of the Louisiana Constitution of 1921 is unconstitutional under the Fourteenth Amendment of the United States Constitution, being in violation of the equal protection clause of said amendment. The constitutional provision under attack provides that the governing authority of the district shall consist of a board of commissioners of five (5) members, and that vacancies on the board of commissioners of the district shall be filled by the governor of the State of Louisiana from a list of three nominees submitted successively by the American Rice Growers Cooperative Council (AFL-CIO), the Lake Charles Maritime Association, the Greater Lake Charles Chamber of Commerce and the West Calcasieu Chamber of Commerce as one organization, and the state senator and representatives in the state legislature representing the Parish of Calcasieu. The question presented is whether or not a method of appointment to such a board which limits the governor's power of appointment to panels of names submitted by private organizations deprives petitioners as taxpayers, electors and residents within the district, and others similarly situated, of equal protection of the law under the Fourteenth Amendment to the Federal Constitution. It is not contended that the governor could not be accorded the right of appointment, but it

is contended that a limitation of this right to panels of three names submitted by special groups is invidious and constitutionally impermissible.

STATEMENT OF THE CASE

Appellants, residents, citizens and taxpayers of the Parish of Calcasieu, State of Louisiana, residing within the limits of the Lake Charles Harbor and Terminal District filed this suit against the Governor of the State of Louisiana seeking to have the trial court declare Article XIV, Section 30.2(b) of the Louisiana Constitution unconstitutional, and to enjoin the defendant from filling a vacancy existing on the board of commissioners of the district under the procedure set out in that constitutional provision.

As found by the Supreme Court of Louisiana (R. V1. 2, P. 128, 135) the harbor district is a political subdivision of the State of Louisiana with fixed territorial limits. LSA-R.S. 34:201. The governing authority of the harbor district is vested in a board of commissioners, and the method of selection of the board is set forth in Article XIV, Section 30.2(b), Louisiana Constitution of 1921, the constitutional amendment in question. The board may regulate the commerce and traffic of the harbor district; it may provide light, water and police protection for the district and for all harbor and terminal facilities situated therein; it may make and collect reasonable charges for the use of all structures, works and facilities administered by the Board, and for any and all services rendered by it; it may regulate, reasonably, the fees and charges to be made by privately owned wharves, docks, warehouses, elevators, and other facilities within the limits of the district when the same are offered for the use of the public; it may borrow

funds for the business of the district; it may levy and collect taxes; it may mortgage properties constructed or acquired by the district, and it may mortgage and pledge any lease or leases and the rents, income, and other advantages arising out of any lease or leases granted, assigned or subleased by it; it may incur debt and issue bonds for its needs in the manner provided by the constitution and laws of the State of Louisiana. LSA-R.S. 34:203. The Board controls and regulates the exports and imports passing through the port district and the number of arrivals and departures of vessels and their tonnage. LSA-R.S. 34:205. The Board may acquire by purchase, donation, expropriation, lease or otherwise, any and all lands in the district needed for railways, warehouses, docks, wharves, sheds, buildings, canals, channels, slips, basins, and other facilities to be owned and operated by the board or to lease to others for manufacturing, commercial and business purposes to promote the industrial development of the district, and it may provide for the payment of such land out of the funds under its control not otherwise specially appropriated. LSA-R.S. 34:206. The board may make or construct any of the works of public improvement in the district and anything in connection therewith that may be necessary or useful for the business of the board. LSA-34:207. The board may let contracts. LSA-R.S. 34:208. The board may, when necessary, levy annually an ad valorem tax not to exceed two and one-half (2½) mills on the dollar of the property subject to taxation situated in the district. All funds derived under this section may be used for any expenses or purposes of the board. LSA-R.S. 34:209. The board has the right to borrow money and issue certificates of indebtedness. LSA-R.S. 34:209. The board is authorized to incur debt and issue negotiable bonds. LSA-R.S. 34:210. The board may levy taxes to pay for bonds,

and in default of payment may have property subject to said taxes sold at tax sale. LSA-R.S. 34:211. The board may issue refunding bonds. LSA-R.S. 34:214. The board has the right to examine and investigate all questions relating to the interest and welfare of the district, to control and regulate the same, and make an annual report to the governor showing all receipts and disbursements of the board. LSA-R.S. 34:205.

The plaintiffs filed their petition on December 30, 1968. (R. V1. 1, P. 4) They alleged that the term of office of a member of the board of commissioners of the Lake Charles Harbor and Terminal District had expired, and that under the constitutional amendment the governor had to appoint a new board member of the district from a list of three nominees submitted to him by the central office of the American Rice Growers Cooperative Association at Lake Charles, Louisiana, a private membership organization. It was plaintiffs' contention that the harbor district with its powers as hereinabove set forth directly affected them and their welfare, and that the denial to them of any voice in the selection of members deprived them of equal protection of the laws as guaranteed to them by the Fourteenth Amendment to the United States Constitution. Pertinent allegations of their petition showing the existence of a federal question recite:

> "The plaintiff has absolutely no voice or choice in the selection of the nominees who are named by the American Rice Growers Cooperative Association at Lake Charles, Louisiana, or the other private membership organizations listed in said constitutional amendment of which he is not a member, and from which nominees the Governor must select a member of the Board of Commissioners of Lake Charles Harbor and Terminal District to expend the taxes

paid by plaintiffs and others to administer the affairs of the district." (R. V1. 1, P. 5)

"Said constitutional amendment involves a Constitutional agency empowered to levy, and actually levying property taxes upon residents and taxpayers living within the area of the district to provide construction of essential facilities, and for the operation and maintenance of these facilities, neither the American Rice Growers Cooperative Association at Lake Charles, Louisiana, nor the other private organizations represent a political group of any kind, or a group authorized by the Constitution and laws of the United States and the State of Louisiana to exercise any kind of public functions, directly or indirectly; and that for these reasons and other reasons shown below, said Constitutional Amendment is illegal and unconstitutional in denying to plaintiff and other taxpayers similarly situated the due process and equal protection which is insured by the Constitution of the United States (particularly, the Fourteenth Amendment thereto) and the Constitution of the State of Louisiana." (R. V1. 1, PP. 5, 6)

The American Rice Growers Cooperative Association at Lake Charles, Louisiana, the Lake Charles Maritime Association, the Greater Lake Charles Chamber of Commerce, the West Calcasieu Chamber of Commerce, Jesse M. Knowles, A. C. Clemons, Jr., Harry M. Hollins, Robert G. Jones, William L. McLeod, Jr., William S. Boyd and Conway LeBleu filed interventions asserting the constitutionality of Section 30.2(b). (R. V1. 1, P. 22)

The trial court rendered judgment (R. V1, 1, P. 38) in favor of plaintiffs and against defendant and intervenors. It found that the harbor district was more than an administrative body, and posed the question of whether the selective

process of the constitutional amendment in question is so arbitrary and invidious as to deny plaintiffs equal protection of the laws. The trial court answered the question as follows:

> "The answer must be in the affirmative. These plaintiffs, and the class they represent, have absolutely no choice in the selection of the board members who have the right to tax them. This is indeed taxation without representation. Four of the five members are selected from a panel of names submitted by private organizations completely beyond and immune to the elective process. The Governor who makes the final selection does not even have a choice. He must select one from the panel submitted by the nominating groups." (R. V1, 1, P. 44)

The trial court also held that the case of *Sailors v. Board of Education of County of Kent*, 387 U.S. 105, 87 S.Ct. 1549, relied upon by defendants and intervenors was not applicable.

The Supreme Court of Louisiana, in a written opinion, reversed and set aside the judgment of the trial court, concluding that Article XIV, Section 30.2(b) of the Constitution was constitutional, and that plaintiffs had suffered neither discrimination nor denial of equal protection of the laws. The court also concluded that the district is an administrative body and that *Sailors v. Board of Education of the County of Kent*, supra, was applicable. (R. V1, 2, P. 128) The plaintiffs timely filed an application for rehearing (R. V1. 2, P. 142) which was denied on October 8, 1969 (R. V1. 2, P. 183). One of the associate justices was of the opinion that a rehearing should be granted. See 226 So.(2d) 464, at page 502.

On December 19, 1969, plaintiffs filed notice of appeal to this court. (R. V1, 2, P. 188)

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

In effect Article XIV, Section 30.2(b) of the Louisiana Constitution grants a franchise to the members of the American Rice Growers Cooperative Association, Lake Charles & Vicinity Central Trades and Labor Council (AFL-CIO), the Lake Charles Maritime Association, the Greater Lake Charles Chamber of Commerce and the West Calcasieu Chamber of Commerce acting as one organization, all of which are private organizations, to participate in and limit the governor's power of appointment rather than allowing the governor to choose for appointment any qualified citizen from among the thousands inhabiting the area.

It is the appellants' position that a method of appointment which limits the governor's power of appointment to panels of names submitted by private organizations deprives appellants, and others similarly situated, equal protection of the law under the Fourteenth Amendment. It is not contended that the governor has no right to appoint, but that a limitation of this right to panels submitted by special groups is invidious and constitutionally impermissible.

In *Reynolds v. Sims*, 377 U.S. 533, 84 S.Ct. 1362 (1964), this court declared:

> "* * * Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic and civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized. * * *"

Reynolds v. Sims, supra, applied the equal protection clause to the apportionment of state legislatures. In *Avery v. Midland County Texas*, 390 U.S. 474, 88 S.Ct. 1114 (1968), the court held that the Fourteenth Amendment likewise forbids the election of local government officials from districts of disparate population. In so holding the court declared:

> "The Equal Protection Clause reaches the exercise of state power however manifested, whether exercised directly or through subdivisions of the state.
>
> " 'Thus the prohibitions of the Fourteenth Amendment extend to all action of the state denying equal protection of the laws; whatever the agency of the state taking the action. * * *' Cooper v. Aaron, 358 U.S. 1, 17, 78 S.Ct. 1401, 1049, 3 L.Edition 2d 5 (1958).
>
> "Although the forms and functions of local government and the relations among the various units are matters of state concern, it is now beyond question that a State's political subdivisions must comply with the Fourteenth Amendment. The actions of the local government are the action of the state. A city, town or county may no more deny the equal protection of the laws than it may abridge freedom of speech, establish an official religion, arrest without probable cause, or deny due process of law."

This court has not retreated from the principles established in *Reynolds* and *Avery*. Recent cases have moved in the direction of tightening the standards applicable to the selection of public officials, and to state statutes which contain classifications selectively distributing the franchise. *Morris H. Kramer v. Union Free School District No. 15, et al*, _____ U.S._____; 89 S.Ct. 1886 (1969); *Cipriano v. City of Houma, et al*, _____U.S._____; 89 S.Ct. 1897 (1969).

Kramer involved a New York Statute providing for the method of election of school board members rather than a method of appointment. However, this court pointed out that "any unjustifiable discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government." The court said in that case:

> " 'In determining whether or not a state law violates the Equal Protection Clause, we must consider the facts and circumstances of the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification. WILLIAMS V. RHODES, 398 U.S. 23, 30 (1968). And, in this case, we must give the statute a close and exacting examination. '[S]ince the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.' REYNOLDS V. RHODES, supra, at 31; WESBERRY V. SANDERS, 376 U.S. 1, 17 (1964). This careful examination is necessary because statutes distributing the franchise constitute the foundation of our representative society. Any unjustified discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government."

In the *Kramer* case the plaintiff, a bachelor, contended that Section 2012 of the New York Education Law was unconstitutional. The legislation provided that in certain elections residents who were otherwise eligible to vote in state and federal elections could vote in school board elections only if they were (i) the owner or lessee of taxable real property located in the district, (ii) the spouse of one who owned or

leased qualifying property, or (iii) the parents or guardian of a child enrolled for a specified time during the preceding year in a local district school.

This court found that Section 2012 did violate the Equal Protection Clause of the Fourteenth Amendment. The court further in its decision pointed out the rigid examination to which any statute must be subjected concerning the selection of public officials, so that a determination can be made whether each resident citizen has, as far as possible, an equal voice in the selections. The court said:

> "Thus, state apportionment statutes, which may *dilute* the effectiveness of some citizens' votes, receive close scrutiny from this Court. REYNOLDS V. SIMS, supra. See AVERY V. MIDLAND COUNTY, 390 U.S. 494 (1968). No less rigid an examination is applicable to statutes *denying* the franchise to citizens who are otherwise qualified by residence and age. Statutes granting the franchise to residents on a selective basis always pose the danger of denying some citizens any effective voice in the governmental affairs which substantially affect their lives. Therefore, if a challenged state statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest. See CARRINGTON V. RASH, supra, at 96.
>
> "And, for these reasons, the deference usually given to the judgment of legislators does not extend to decisions concerning which resident citizens may participate in the election of legislators and other public officials. Those decisions must be carefully scrutinized by the Court to determine whether each resident citizen has, as far as

possible, an equal voice in the selections. Accordingly, when we are reviewing statutes which deny some residents the right to vote, the general presumption of constitutionality afforded state statutes and the traditional approval given state classifications if the Court can conceive of a 'rational basis' for the distinctions made are not applicalbe. See HARPER V. VIRGINIA BD. OF ELECTIONS, 383 U.S. 633, 670 (1966). The presumption of constitutionality and the approval given 'rational' classifications in other types of enactments are based on an assumption that the institutions of state government are structured so as to represent fairly all the people. However, when the challenge to the statute is in effect a challenge of this basic assumption, the assumption can no longer serve as the basis for presuming constitutionality. And, the assumption is no less under attack because the legislature which decides who may participate at the various levels of political choice is fairly elected. Legislation which delegates decision-making to bodies elected by only a portion of those eligible to vote for the legislature can cause unfair representation. Such legislation can exclude a minority of voters from any voice in the decisions just as effectively as if the decisions were made by legislators the minority had no voice in selecting."

The court further pointed out that once the franchise is granted lines may not be drawn which are inconsistent with the Equal Protection Clause. In the present case although an appointment is made by the governor, a franchise has been granted to a limited number of private groups to designate the panels from which the governor must appoint.

In the *Kramer* case this court said the following which is here relevant:

"The need for exacting judicial scrutiny of statutes

distributing the franchise is undiminished simply because, under a different statutory scheme, the offices subject to election might have been filled through appointment. States do have latitude in determining whether certain public officials shall be selected by election or chosen by appointment and whether various questions shall be submitted to the voters. In fact, we have held that where a county school board is an administrative, not legislative, body, its members need not be elected. SAILORS V. KENT BD. OF EDUCATION, 387 U.S. 105, 108 (1967). However, *'once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment.'* " (Emphasis supplied)

The Supreme Court of Louisiana held that the Lake Charles Harbor and Terminal District was an administrative body. Petitioners do not agree with this conclusion because of the broad power exercised by the district as set forth in the Statement of the Case, but in any event, under the *Kramer* decision this is immaterial, as shown by the following quotation:

"Nor is the need for close judicial examination affected because the district meetings and the school board do not have 'general' legislative powers. Our exacting examination is necessitated not by the subject of the election; rather, it is required because some resident citizens are permitted to participate and some are not. For example, a city charter might well provide that the elected city council appoint a mayor who would have broad administrative powers. Assuming the council were elected consistent with the commands of the Equal Protection Clause, the delegation of power to the mayor would not call for this Court's exacting review. On the other hand, if the city charter made the office of mayor subject

to an election in which only some resident citizens were entitled to vote, there would be presented a situation calling for our close review."

The above quotation also emphasizes the point that those participating in an appointment must be selected "consistent with the demands of the Equal Protection Clause."

Also significant to the present discussion is *Joseph Q. Cipriano v. City of Houma, et al*, _____U.S._____; 89 S.Ct., 1897 (decided June 16, 1969), wherein this court held that the provisions of Louisiana law giving only property taxpaying electors the right to vote in a utility bond election were unconstitutional. We quote the following from that case:

"As we noted in KRAMER ANTE, if a challenged state statute grants the right to vote in a limited purpose election to some otherwise qualified voters and denies it it to others, 'the Court must determine whether the exclusions are necessary to promote a compelling state interest.' KRAMER V. UNION FREE SCHOOL DISTRICT NO. 15, ANTE, at 6. Moreover, no less showing that the exclusions are necessary to promote a compelling state interest is required merely because 'the questions scheduled for the election need not have been submitted to the voters.' Id. at 8, n. 11."

Further in the same opinion the court said:

"The challenged statute contains a classification which excludes otherwise qualified voters who are as substantially affected and directly interested in the matter voted upon as are those who are permitted to vote. When, as in this case, the State's sole justification for the statute is that the classification provides a 'rational basis' for

> limiting the franchise to those voters with a 'special interest,' the statute clearly does not meet the 'exacting standards of precision we require of statutes which selectively distribute the franchise.' KRAMER V. UNION FREE SCHOOL DISTRICT NO. 15, ANTE, at 11. We therefore reverse the judgment of the District Court."

Sailors v. Board of Education of the County of Kent, supra, is inapposite to the case at bar. There, the membership of the county board was actually determined by the local board, and the local board members who in effect made the county board appointments, were elected. Furthermore, the functions of the county board in that case were very narrow, and almost limited to an advisory board, as opposed to the Lake Charles Harbor and Terminal District, which has very broad powers, as outlined above.

On the basis of the foregoing it is respectfully submitted that Section 30.2(b) of Article XIV of the Louisiana Constitution violates the equal protection clause of the Fourteenth Amendment in that it provides for a method of selection to public office which excludes participation by qualified citizens who are substantially affected and are as directly interested as those who are permitted to participate in the selection, and that such discrimination is without rational basis.

CONCLUSION

The issues here are substantial; the federal questions presented are of great importance, and this court should give plenary consideration to this case to resolve the issues herein presented, with briefs on the merits and oral argument, and a final decision by this high court.

Respectfully submitted,

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PROOF OF SERVICE

I, C. ALVIN TYLER, one of the attorneys for EDMOND J. HAMILTON and JOHN L. DATENHOFF, appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ____ day of_____, 19____, I served copies of the foregoing Jurisdictional Statement on the several parties to this appeal, by mailing copies in duly addressed envelopes, with first class postage prepaid, as follows:

To: JACK P. F. GREMILLION, Attorney General of the State of Louisiana, of counsel for appellant, John J. McKeithen, Governor of the State of Louisiana, State Capitol, Baton Rouge, Louisiana

To: KENNETH C. DeJEAN, Special Counsel, of counsel for John J. McKeithen, Governor of the State of Louisiana, Office of the Attorney General, State Capitol, Baton Rouge, Louisiana

To: WILLIE D. MAYOR, Assistant Attorney General, of counsel for appellant, John J. McKeithen, Governor of the State of Louisiana, Office of the Attorney General, State Capitol, Baton Rouge, Louisiana

To: SAM H. JONES, G. ALLEN KIMBALL and WILLIAM M. NOLEN, Attorneys for appellant, John J. McKeithen, Governor of the State of Louisiana, and attorneys for intervenor-appellant, American Rice Growers Cooperative Association of Lake Charles, Louisiana, Jones, Kimball, Harper, Tete & Wetherill,

Gulf National Bank Building, P. O. Box 910, Lake Charles, Louisiana 70601

To: EVERETT R. SCOTT, JR., attorney for intervenor-appellant, Lake Charles Maritime Association, Kaufman, Anderson, Leithead, Scott & Boudreau, 117 W. Broad Street, P. O. Box 1299, Lake Charles, Louisiana 70601

To: THOMAS L. RAGGIO, attorney for intervenor, Greater Lake Charles Chamber of Commerce, Hall, Raggio, Farrar & Barnett, Magnolia Building, Lake Charles, Louisiana 70601

To: THOMAS M. BERGSTEDT, Attorney for intervenor, West Calcasieu Chamber of Commerce, Scotfield, Cox & Bergstedt, 126 West Kirby Street, Lake Charles, Louisiana 70161

To: MEREDITH T. HOLT, attorney for intervenors, Jesse M. Knowles, A. C. Clemmons, Jr., Harry M. Hollins, Robert G. Jones, William L. McLeod, Jr., William S. Boyd, and Conway LeBleu, Holt and Woodley, Pioneer Building, Lake Charles, Louisiana 70601

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OPINION OF THE TRIAL COURT

EDMOND J. HAMILTON,	:	NUMBER 131,429—
ET AL.	:	DOCKET 4
	:	19th JUDICIAL DIS-
VS.	:	TRICT COURT, PARISH
JOHN J. McKEITHEN,	:	OF EAST BATON ROUGE
GOVERNOR OF LOUISIANA	:	STATE OF LOUISIANA

Plaintiffs, as taxpayers of the Parish of Calcasieu, residing within the territorial limits of the Lake Charles Harbor and Terminal District, hereinafter referred to as Harbor District, have brought this action seeking an injunction to prevent Governor John J. McKeithen from making an appointment to said Harbor District under the authority set forth in Article 14, Section 30.2(B) of the Constitution of the State of Louisiana, quoted below, to-wit:

> B. The governing authority of this district shall be a board of commissioners whose members shall be appointed by the governor and which shall be known as the Board of Commissioners of Lake Charles Harbor and Terminal District. The board shall consist of five members who shall be citizens of the United States and qualified voters and taxpayers, and inhabitants of said district during their terms of office. The commissioners shall serve overlapping terms, as established by Act No. 67 of 1924, of six years each. The present members shall continue to serve on the board for the duration of their respective

terms. Any vacancies in the membership of the board hereafter occurring by reason of expiration of the terms for which appointed, or by reason of death, resignation or otherwise shall be filled in the following manner:

(1). The first vacancy on the board shall be filled by appointment by the governor, with the advice and consent of the senate, from a list of three nominees submitted to the governor by the central office of the American Rice Growers Cooperative Association at Lake Charles, Louisiana.

(2). The next vacancy on the board shall be filled by appointment by the governor, with the advice and consent of the senate, from a list of three nominees submitted to the governor by the Lake Charles and Vicinity Central Trades & Labor Council, AFL-CIO, as one organization.

(3). The next vacancy on the board shall be filled by appointment by the governor, with the advice and consent of the senate, from a list of three nominees submitted to the governor by the Lake Charles Maritime Association.

(4). The next vacancy on the board shall be filled by appointment by the governor, with the advice and consent of the senate, from a list of three nominees submitted to the governor by the Greater Lake Charles Chamber of Commerce, and the West Calcasieu Chamber of Commerce acting as one organization.

(5). The next vacancy on the board shall be filled by appointment by the governor, with the advice and consent of the senate, from a list of three nominees submitted to the governor by the state senators and representatives in the legislature representing the parish of Calcasieu.

(6). Any further vacancies shall be filled in the same

order of rotation as shown in subsections (1) through (5) of Section B hereof.

(7). If now, or hereafter, one or more of the five organizations or groups set forth above has no commissioner on the board, the governor, the board, and the five organizations shall proceed to rectify this failure of representation of one or more groups by diverting, in case of a vacancy, from the order of appointments named hereinabove and by receiving nominations instead from the unrepresented organizations or groups, and then thereafter shall revert to the order of nominations and appointments, as set forth in subparagraphs (1) through (5) above, with the American Rice Growers Cooperative Association having first priority in submitting nominees to the governor, the Lake Charles and Vicinity Central Trades & Labor Council, AFL-CIO shall have second priority, the Lake Charles Maritime Association shall have third priority, the Greater Lake Charles Chamber of Commerce and the West Calcasieu Chamber of Commerce acting as one organization shall have fourth priority, and the Louisiana Legislators representing Calcasieu Parish shall have fifth priority. It is the intention of this language that the purpose of providing one commissioner for each organization shall be corrected and rectified at the earliest possible date, and at the time of the earliest possible vacancy. To facilitate this transition each of the five organizations shall, within 30 days after the promulgation of this amendment, notify both the governor and the board of commissioners whether it has, or has not been provided with a commissioner on the effective date of this amendment, with the name of such commissioner if it has one; and if it has none, it shall so certify such fact to the governor and to the board of commissioners.

(8). The organizations referred to in Subsection B above shall be understood and construed to be the five

organizations presently existing in the city of Lake Charles by the designated names, or their respective legal successors.

(9). If any one or more of the organizations referred to in Subsection B hereof ceases to exist or to function without any legal successor, then the nominees to be submitted to the governor by such organization shall instead be submitted by the state senators and representatives representing the parish of Calcasieu.

(10). In the event that for any reason the governor fails to receive three nominees for a given vacancy, as provided in Subsection B above, within sixty days after the expiration of the term of any member of the board or the occurrence of a vacancy on the board from any other cause, the governor shall proceed forthwith to make an appointment to fill such vacancy. The organization failing to submit such nominees shall lose its turn in the rotation.

(11). Any commissioner may be removed by the governor, but only for cause and on charges preferred against him in writing and after public hearing and proof of the sufficiency of such charges; provided that any commissioner so removed shall have the right to test in the courts the sufficiency of the charges and of the evidence tendered in support thereof.

(12). The commissioners shall serve without compensation and shall have the power to organize and reorganize legal, executive, engineering, clerical and other department and forces of the said board and to fix the duties, powers and compensation of all officers, agents and employees of said board.

Simply stated the governor must pick new members to

the Harbor District from a list of three nominees submitted to him from the various groups and organizations named in the amendment.

The Louisiana constitutional provision in question was adopted by vote of the people on November 5, 1968. It passed statewide and in the Parish of Calcasieu, and was duly promulgated to be effective December 14, 1968.

The Harbor District possesses many and varied powers and duties, LRS 34:201, et seq. It may acquire land by purchase, expropriation, and other means, LRS 34:206. It may construct any public improvement in the district that it deems necessary and useful, LRS 34:207. It may let contracts, LRS 34:208. It may charge fees, *levy ad valorem taxes* and borrow money, LRS 34:209. It may incur debt and issue bonds, and may call elections to submit the question of incurring debt to the taxpaying voters of the district, LRS 34:210. It may levy taxes to pay for bonds, and in default of payment may have property subject to said taxes sold at tax sale, LRS 34:211. It also has the power to examine and investigate all questions relating to the interest and welfare of the district, and it shall control and regulate the same* * * *, LRS 34:205.

Plaintiffs' main contention is that the Harbor District with its powers, as set forth above, directly affects them and their welfare, and the denial to them of any voice in the selection of the members of the Harbor District deprives them of equal protection of the laws as guaranteed to them by the 14th Amendment of the United States Constitution. Plaintiffs cite the case of *Avery v. Midland County* (1968), 390 U. S. 474; 88 Sup. Ct. 1114, to support this contention. The

Avery case is the latest expression of the "one man, one vote" principle set forth in *Reynolds v. Sims*, 84 Sup. Ct. 1362 (1964).

A petition of intervention was filed on behalf of most of the groups and organizations who, under the constitutional amendment in question, make the nominations to the governor. The governor and these intervenors maintain primarily that this method of selection is not contrary to the 14th Amendment and cite as their basic authority the case of *Sailors v. Board of Education of County of Kent* (1967), 387 U. S. 105; 87 Sup. Ct. 1549.

The Supreme Court in *Sailors* found that the method of selecting members to the Kent County Board of Education was appointive rather than elective and that the functions of the board were administrative rather than legislative. It was held that where these two factors are present, the principle of "one man, one vote" had no relevancy. The Court said:

> We find no constitutional reason why state or local officers of the *nonlegislative* character involved here may not be chosen by the governor, or by the legislature or by *some other appointive means* * * * *. (Emphasis supplied.)

Defendant and intervenors contend that *Sailors* is clear authority for the proposition that the power to levy ad valorem property taxes does not make a body legislative in character. The County School Board in question was recognized as having the power to levy taxes, but the only mention of this power was in a footnote (87 Sup. Ct. 1549 at 1553, footnote 7), where its powers were enumerated. One of the enumerated powers was the preparation of an annual budget and levy of taxes,

and Michigan Statutes Annotated, 15:3298(1) is cited as authority therefor. This statute, however, does not actually give the school board the same taxing powers as the Harbor District possesses under LRS 34:209. All the school board may do is submit its budget to the tax allocation board of the county. The tax allocation board allocates the tax rates in accordance with certain guidelines set out by statute. It is the county tax allocation board rather than the school board that allocates the tax rates. See Michigan Statutes Annotated, 15:3298(1) and 7:65, et seq.

Counsel for defendant and intervenors maintain that the later case of *Avery*, relied upon by plaintiffs, is consistent [with] *Sailors*. This court agrees. In fact, it was obvious Midland County was attempting to persuade the court to apply its *Sailors* rule to it. The Court was urged to permit an unequal distribution for the Midland County Commissioners Court on the ground that the court's function was not sufficiently "legislative." Much effort was expended in urging that alternative labels, "administrative" versus "legislative," be applied to the Commissioners Court.

In discussing this difference the Court used the following language which is most useful as a guide to determine what are legislative duties, to-wit:

> * * * * the court does have power to make a large number of decisions having a broad range of impact on all the citizens of the county. It sets a *tax rate*, equalizes assessments and *issues bonds** * * *. (Emphasis supplied.)

The court found that the commissioners court was a legislative body, and said:

> Our decision today is only that the Constitution imposes one ground rule for the development of arrangements of local government: a requirement that units with general governmental powers over an entire geographic area may not be apportioned among single-member districts of substantial unequal population.

This court is, therefore, obliged to decide whether the Harbor District is purely an *"administrative"* body so as to come under the rule of *Sailors* or whether said Harbor District is a body possessing "general governmental powers over an entire geographic area" so as to come under the rule of *Avery* and *Reynolds*. If the rule of *Avery* is applicable, then in addition the court must decide whether the selective process set forth in the Louisiana constitutional amendment is arbitrary or invidious to the extent that it denies plaintiffs equal protection of the laws. The Supreme Court in *Avery* said:

> The equal protection clause does not, of course, require that a State never distinguish between citizens, but only that the distinctions that are made not be arbitrary or invidious.

It is obvious to the court that the Harbor District is more than an administrative body. Its powers are very broad, however they are not as far reaching as the powers vested in a police jury, city council, or other local governing authority.

The Harbor District has power to levy ad valorem taxes on all property situated within the district to the extent of two and a half mills, LRS 34:209. This is definitely a power which the Kent County Board of Education did not possess. The Harbor District also has sweeping powers, as set forth in

LTS 34:205, to examine and investigate all questions relating to the interest and welfare of the district and to control and regulate the same.

It is curious that the Louisiana constitutional provision, Art. 6, Sec. 69, which set up the Greater Baton Rouge Port Commission denied to that commission the right to levy an ad valorem tax.

The Caddo-Bossier Parish Port Commission, Art. 6, Sec. 32 of the Louisiana Constitution may levy an ad valorem tax, but only after a tax election so authorizes. The same restriction applies to the Lake Providence Port Commission, Art. 6, Sec. 33; the Concordia Parish Port Commission, Art 6, Sec. 34; the Avoyelles Parish Port Commission, Art. 6, Sec. 35, and the Rapides Parish Port Commission, Art. 6, Sec. 36.1. The South Louisiana Port Commission, Art. 6, Sec. 33.1 of the Louisiana Constitution may not levy ad valorem taxes.

The Harbor District's power to levy taxes without the necessity of approval of the voters, together with its other powers, in this court's opinion removes it from the *Sailors* rule. It is clearly somewhere in between an administrative body and a general governmental body. It comes closer to being the latter, however, because its powers to levy ad valorem taxes and issue bonds are clearly legislative powers.

Having concluded that the Harbor District is more of a legislative than an administrative body, this court is without precedent from the Supreme Court because in *Sailors* that Court said:

> We need not decide at the present time whether a

> state may constitute a local legislative body through the appointive rather than the elective process * * * *.

Since the ruling of *Sailors* is not applicable to the case at bar, it must now be decided whether the selective process of the constitutional amendment in question is so arbitrary and invidious as to deny plaintiffs equal protection of the laws.

The answer must be in the affirmative. These plaintiffs, and the class they represent, have absolutely no choice in the selection of the board members who have the right to tax them. This is indeed taxation without representation. Four of the five members are selected from a panel of names submitted by private organizations completely beyond and immune to the elective process. The governor who makes the final selection does not even have a choice. He must select one from the panel submitted by the nominating groups.

As correctly stated in learned counsel for plaintiffs' brief, the admonition against "taxation without consent" is reposed in our Declaration of Independence. It is one of the cornerstones upon which our great republic was built. Any system or plan, no matter how benevolent it may seem, which would deprive a qualified taxpayer of his right to a voice in the selection of those who are to impose taxes upon him must be looked upon with suspicion. To do otherwise seriously impairs a citizen's and taxpayer's right to equal protection of the laws.

Accordingly, this court holds that to deprive these plaintiffs, and the class they represent, of the right to participate in the selection of the Board of Commissioners of the Lake Charles Harbor and Terminal District violates the 14th Amend-

ment of the Constitution of the United States because plaintiffs have been denied equal protection of the laws, and Article 14, Section 30.2(B) of the Louisiana Constitution is unconstitutional.

For the reasons assigned, there is judgment herein in favor of plaintiffs and against the defendant, John J. McKeithen, Governor of the State of Louisiana, permanently restraining, enjoining and prohibiting him from making an appointment to the Lake Charles Harbor and Terminal District under any authority derived from the provisions of Article 14, Section 30.2(B) of the Constitution of the State of Louisiana.

Defendant's exception of no cause of action is overruled.

Judgment will be signed accordingly.

February 26, 1969

MELVIN A. SHORTESS, Judge

FILED
Feb. 26, 1969

GLADYS C. HEARNE
Dy. Clerk of Court

OPINION OF THE LOUISIANA SUPREME COURT

SUPREME COURT OF LOUISIANA

No. 49,762

EDMOND J. HAMILTON, ET AL

VS.

JOHN J. McKEITHEN, GOVERNOR

On Appeal from the Nineteenth Judicial District Court in and for the Parish of East Baton Rouge, State of Louisiana. Honorable Melvin A. Shortess, Judge.

HAMLIN, Justice:

John J. McKeithen, Governor of the State of Louisiana, American Rice Growers Cooperative Association at Lake Charles, Louisiana, the Lake Charles Maritime Association, the Greater Lake Charles Chamber of Commerce, the West Calcasieu Chamber of Commerce, Jesse M. Knowles, A. C. Clemons, Jr., Harry M. Hollins, Robert G. Jones, William L. McLeod, Jr., William S. Boyd, and Conway LeBleu devolutively appeal from a final judgment of the trial court, March 12, 1969, which permanently restrained, enjoined, and prohibited John J. McKeithen, Governor of the State of Louisiana (hereinafter referred to as Governor McKeithen), from making an appointment to the Board of Commissioners of the

Lake Charles Harbor and Terminal District under any authority derived from the provisions of Art. XIV, Sec. 30.2(B), La. Const. of 1921, and overruled an exception of no cause of action filed by defendant.[1]

The trial court declared Art. XIV, Sec. 30.2(B), La. Const. of 1921, unconstitutional, stating in reasons for judgment, "Accordingly, this court holds that to deprive these plaintiffs, and the class they represent, of the right to participate in the selection of the Board of Commissioners of the Lake Charles Harbor and Terminal District violates the 14th Amendment of the Constitution of the United States because plaintiffs have been denied equal protection of the laws, and Article 14, Section 30.2(B) of the Louisiana Constitution is unconstitutional."

Act 708, a joint resolution proposing an amendment to Sec. 30.2 of Art. XIV of the Constitution to provide with respect to the membership and the appointment of the Members of the Board of Commissioners of the Lake Charles Harbor and Terminal District, was enacted during the 1968 Session of the Louisiana State Legislature. The amendment was submitted to the electors for their approval or rejection, and, after approval, was adopted as law November 5, 1968 and duly promulgated December 14, 1968. Art. XIV, Sec. 30.2(B) recites:

> "The governing authority of this district shall be a board of commissioners whose members shall be appointed

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[1] It was stipulated among counsel for plaintiffs, defendant, and intervenors that with the agreement of the trial court that this case be heard on the question of the permanent injunction in order that a definitive judgment might be rendered as a result of the hearing. The peremptory exception of no cause of action was referred to the merits.

by the governor and which shall be known as the Board of Commissioners of Lake Charles Harbor and Terminal District. The board shall consist of five members who shall be citizens of the United States and qualified voters and taxpayers, and inhabitants of said district during their terms of office. The commissioners shall serve overlapping terms, as established by Act No. 67 of 1924, of six years each. The present members shall continue to serve on the board for the duration of their respective terms. Any vacancies in the membership of the board hereafter occurring by reason of expiration of the terms for which appointed, or by reason of death, resignation or otherwise shall be filled in the following manner:

"(1). The first vacancy on the board shall be filled by appointment by the governor, with the advice and consent of the senate, from a list of three nominees submitted to the governor by the central office of the American Rice Growers Cooperative Association of Lake Charles, Louisiana.

"(2) The next vacancy on the board shall be filled by appointment by the governor, with the advice and consent of the senate, from a list of three nominees submitted to the governor by the Lake Charles and Vicinity Central Trades & Labor Council, AFL-CIO, as one organization.

"(3) The next vacancy on the board shall be filled by appointment by the governor, with the advice and consent of the senate, from a list of three nominees submitted to the governor by the Lake Charles Maritime Association.

"(4) The next vacancy on the board shall be filled by appointment by the governor, with the advice and consent of the senate, from a list of three nomi-

nees submitted to the governor by the Greater Lake Charles Chamber of Commerce, and the West Calcasieu Chamber of Commerce acting as one organization.

"(5) The next vacancy on the board shall be filled by appointment by the governor, with the advice and consent of the senate, from a list of three nominees to the governor by the state senators and representatives in the legislature representing the parish of Calcasieu.

"(6) Any further vacancies shall be filled in the same order of rotation as shown in subsections (1) through (5) of Section B hereof.

"(7) If now, or hereafter, one or more of the five organizations or groups set forth above has no commissioner on the board, the governor, the board, and the five organizations shall proceed to rectify this failure of representation of one or more groups by diverting, in case of a vacancy, from the order of appointments named hereinabove and by receiving nominations instead from the unrepresented organizations or groups, and then thereafter, shall revert to the order of nominations and appointments, as set forth in sub-paragraphs (1) through (5) above. If more than one of the five organizations are unrepresented on the board, priorities shall be in the order of rotation as shown in sub-paragraphs (1) through (5) above, with the American Rice Growers Cooperative Association having first priority in submitting nominees to the governor, the Lake Charles and Vicinity Central Trades & Labor Council, AFL-CIO shall have second priority, the Lake Charles Maritime Association shall have third priority, the Greater Lake Charles Chamber of Commerce and the West

Calcasieu Chamber of Commerce acting as one organization shall have fourth priority, and the Louisiana Legislators representing Calcasieu Parish shall have fifth priority. It is the intention of this language that the purpose of providing one commissioner for each organization shall be corrected and rectified at the earliest possible date, and at the time of the earliest possible vacancy. To facilitate this transition each of the five organizations shall, within 30 days after the promulgation of this amendment, notify both the governor and the board of commissioners whether it has, or has not been provided with a commissioner on the effective date of this amendment, with the name of such commissioner if it has one; and if it has none, it shall so certify such fact to the governor and to the board of commissioners.

"(8) The organizations referred to in Subsection B above shall be understood and construed to be the five organizations presently existing in the city of Lake Charles by the designated names, or their respective legal successors.

"(9) If any one or more of the organizations referred to in Subsection B hereof ceases to exist or to function without any legal successor, then the nominees to be submitted to the governor by such organization shall instead be submitted by the state senators and representatives representing the parish of Calcasieu.

"(10) In the event that for any reason the governor fails to receive three nominees for a given vacancy, as provided in Subsection B above, within sixty days after the expiration of the term of any member of the board or the occurrence of a vacancy on the board from any other cause, the governor

shall proceed forthwith to make an appointment to fill such vacancy. The organization failing to submit such nominees shall lose its turn in the rotation.

"(11) Any commissioner may be removed by the governor, but only for cause and on charges preferred against him in writing and after public hearing and proof of the sufficiency of such charges; provided that any commissioner so removed shall have the right to test in the courts the sufficiency of the charges and of the evidence tendered in support thereof.

"(12) The commissioners shall serve without compensation and shall have the power to organize and reorganize legal, executive, engineering, clerical and other departments and forces of the said board and to fixe the duties, powers and compensation of all officers, agents and employees of said board."

As residents, citizens and taxpayers of the Parish of Calcasieu residing within the territorial limits of the Lake Charles Harbor and Terminal District, plaintiffs filed a petition for injunction on December 30, 1968. They alleged that the term of office of a Member of the Board of Commissioners of the Lake Charles Harbor and Terminal District (hereinafter referred to as the Harbor District) had expired, and that under the constitutional amendment supra Governor McKeithen had to pick a new Board Member of said Harbor District from a list of three nominees submitted to him by the Central Office of The American Rice Growers Cooperative Association at Lake Charles, Louisiana, a private membership organization. Mainly they contended that the Harbor District with its powers, as set forth infra, directly affected them and their welfare, and that the denial to them of any voice in the selection of

members deprived them of equal protection of the laws as guaranteed to them by the Fourteenth Amendment to the United States Constitution. Pertinent allegations of their petition recite:

> "The plaintiff[s] has absolutely no voice or choice in the selection of the nominees who are named by The American Rice Growers Cooperative Association at Lake Charles, Louisiana, or the other private membership organizations listed in said Constitutional Amendment of which he is not a member, and from which nominees the Governor must select a member of the Board of Commissioners of the Lake Charles Harbor and Terminal District to spend the taxes paid by the plaintiff[s] and others and to administer the affairs of the District.
>
> "Said Constitutional Amendment involves a Constitutional agency empowered to levy, and actually levying property taxes upon residents and taxpayers living within the area of the District to provide construction of essential facilities, and for the operation and maintenance of these facilities, and neither the American Rice Growers Cooperative Association at Lake Charles, Louisiana nor the other private organizations represent a political group of any mind, or a group authorized by the Constitution and laws of the United States and the State of Louisiana to exercise any kind of public functions, directly or indirectly; and that for these reasons and other reasons shown below, said Constitutional Amendment is illegal and unconstitutional in denying to plaintiff and other taxpayers similarly situated the due process and equal protection which is insured by Constitution of the United States (particularly, the Fourteenth Amendment thereto), and the Constitution of the State of Louisiana.
>
> "That plainly the Constitutional Amendment completely deprives the plaintiff and others similarly situated

of any voice, or in the alternative, of an equal voice in the picking of the nominees, as was true under the Constitution and laws of the State of Louisiana prior to the enactment of said Constitutional Amendment, and actually amounts to taxation of the plaintiff without representation, and/or in the alternative, without equal representation."

Answering plaintiffs' petition on January 13, 1969, Governor McKeithen denied the allegations with respect to the unconstitutionality of the constitutional amendment; he asserted the amendment's constitutionality and prayed for the dismissal of plaintiffs' suit. Peremptory exceptions of nonjoinder of indispenable parties and no cause of action were also filed on January 13, 1969.

On January 13, 1969, The American Rice Growers Cooperative Association at Lake Charles, Louisiana, the Lake Charles Maritime Association, the Greater Lake Charles Chamber of Commerce, the West Calcasieu Chamber of Commerce, Jessie M. Knowles, A. C. Clemons, Jr., Harry M. Hollins, Robert G. Jones, William L. McLeod, Jr.; William S. Boyd, and Conway LeBleu filed an intervention asserting the constitutionality of Sec. 30.2(B) and praying for the dismissal of plaintiffs' suit.

The trial court rendered judgment in favor of plaintiffs and against defendant and intervenors. It found that the Harbor District was more than an administrative body. It further found that the ruling of *Sailors v. Board of Education of County of Kent*, 387 U.S. 105, 87 S.Ct. 1549, 18 L.Ed. 2d 650, to the effect that there was no constitutional reason why state or local officers of the non-legislative character involved in that case might not be chosen by the Governor, by the Legis-

lature, or by some other appointive means rather than by election was not applicable. Herein, the trial court posed the question of whether the selective process of the constitutional amendment in question is so arbitrary and invidious as to deny plaintiffs equal protection of the laws. It stated:

> "The answer must be in the affirmative. These plaintiffs, and the class they represent, have absolutely no choice in the selection of the board members who have the right to tax them. This is indeed taxation without representation. Four of the five members are selected from a panel of names submitted by private organizations completely beyond and immune to the elective process. The governor who makes the final selection does not even have a choice. He must select one from the panel submitted by the nominating groups."

As stated supra, the trial court held that Sec. 30.2(B) was unconstitutional and granted plaintiffs the relief prayed for.

Defendant assigns the following errors to the judgment of the trial court:

> "1. The trial judge erred in holding that the provisions of Article 14, Section 30.2(B) of the Louisiana Constitution were unconstitutional under the Equal Protection Clause of the 14th Amendment to the Constitution of the United States.
>
> "2. The trial judge erred in enjoining the Governor from making any appointment to the Board of Commissioners of the Lake Charles Harbor and Terminal District under an authority derived from Article 14, Section 30.2(B) of the Louisiana Constitution.

"3. In the alternative, and only if this honorable court should conclude that the trial judge did not err in the decisions complained of above, then the trial judge erred in failing to specifically order that the members of the Board of Commissioners of the Lake Charles Harbor and Terminal District be chosen by election and in failing to establish guidelines to be followed by the Legislature of Louisiana in providing for such elections."

Posed for our determination is the question of whether plaintiffs are deprived of equal protection of the laws by Governor McKeithen's appointment—such power of appointment having been vested in him by the Legislature and by the electors of the State—of Members of the Board of Commissioners of the Harbor District rather than by having the members elected by the district's qualified electorate.

The Harbor District was created by Act No. 67 of 1924 as a political subdivision of the State of Louisiana with fixed territorial limits. LSA-R.S. 34:201. The governing authority of the Harbor District is vested in a Board of Commissioners, and the method of selection of the Board is that set forth in Art. XIV, Sec. 30.2(B), La. Const. of 1921, the constitutional amendment in question. The Board may regulate the commerce and traffic of the Harbor District. "* * * it may provide light, water and police protection for the district and for all harbor and terminal facilities situated therein; it may make and collect reasonable charges for the use of all structures, works and facilities administered by the board, and for any and all services rendered by it; it may regulate, reasonably, the fees and charges to be made by privately owned wharves, docks, warehouses, elevators and other facilities within the limits of the district when the same are offered for the use

of the public; it may borrow funds for the business of the district; it may levy and collect taxes; it may mortgage properties constructed or acquired by the district and it may mortgage and pledge any lease or leases and the rents, income and other advantages arising out of any lease or leases granted, assigned or subleased by it; it may incur debt and issue bonds for its needs in the manner provided by the Constitution and laws of the State of Louisiana, including, but not by way of limitation, Article XIV, Section 14, paragraph (b.2) and Article XIV, Section 31 of the Constitution." LSA-R.S. 34:203. See, Wright v. Lake Charles Harbor and Terminal Dist., 188 So.2d 449, 249 La. 620, 188 So.2d 922. The Board shall control and regulate the exports and imports passing through the port district and the number of arrivals and departures of vessels and their tonnage. LSA-R.S. 34:205. "The board may acquire by purchase, donation, expropriation, lease or otherwise, any and all lands in the district needed for railways, warehouses, docks, wharves, sheds, buildings, canals, channels, slips, basins and other facilities to be owned and operated by the board or to lease to others for manufacturing, commercial and business purposes to promote the industrial development of the district and it may provide for the payment of such land out of the funds under its control not otherwise specially appropriated." LSA-R.S. 34:206. The Board may make or construct any of the works of public improvement in the district and anything in connection therewith that may be necessary or useful for the business of the Board. LSA-R.S. 34:207. The Board may let contracts. LSA-R.S. 34:208. "The board may, when necessary, levy annually an ad valorem tax not to exceed two and one-half mills on the dollar on the property subject to taxation situated in the district. All funds derived under this Section may be used for any expenses or purposes of the

board." LSA-R.S. 34:209. The Board has the right to borrow money and issue certificates of indebtedness. LSA-R.S. 34:-209. The Board is authorized to incur debt and issue negotiable bonds. LSA-R.S. 34:210. The Board may levy taxes to pay for bonds, and in default of payment may have property subject to said taxes sold at tax sale. LSA-R.S. 34:211. The Board may issue refunding bonds. LSA-R.S. 34:214. "The board shall examine and investigate all questions relating to the interest and welfare of the district; it shall control and regulate the same, and make an annual report to the governor showing all receipts and disbursements of the board." LSA-R.S. 34:205.

Reason dictates that the word "district" employed in Part II, Ports and Harbors, Lake Charles Harbor and Terminal District, LSA-R.S. 34:201-34:241, refers and applies to the Lake Charles Harbor and Terminal District and not to any other political subdivision.[2]

Act 67 of 1924 stated that it was, "Creating the Lake Charles Harbor and Terminal District; establishing a Board of Commissioners therefor; defining their powers, jurisdiction and duties; providing revenue therefor; authorizing said Commission to levy taxes, to incur debt, and to issue bonds for works of public improvements; title to all of which shall be in the public and for public purposes in said District and generally to do any and all things necessary or proper for the government, regulation, development and control of the business of said district and repealing conflicting laws. Due notice

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[2] Argument was made in this Court by counsel for plaintiffs that the powers granted to the Harbor District were not confined to such district.

of the intention to introduce this act in the Legislature having been published as required by Section 6 of Article IV of the Constitution and evidence of said publication exhibited to the Legislature."

Act 67 of 1924 was enacted by the Legislature, and the members thereof were duly elected by the electors of the State, which electorate included electors from the Harbor District. The Act had a single and special purpose. It created a political subdivision and also created a Board to direct, operate, and govern such subdivision. The subdivision was not strictly a geographical unit; it merely had territorial limits.

We find that the original enactment of the Legislature creating the Harbor District meets the following test set forth by the United States Supreme Court in Reynolds v. Sims, 377 U. S. 533, 84 S.Ct. 1362, 1383, 12 L.Ed.2d 506 (1964):

> "But representative government is in essence self-government through the medium of elected representatives of the people, and each and every citizen has an inalienable right to full and effective participation in the political processes of his State's legislative bodies. Most citizens can achieve this participation only as qualified voters through the election of legislators to represent them. Full and effective participation by all citizens in state government requires, therefore, that each citizen has an equally effective voice in the election of members of his state legislature. Modern and viable state government needs, and the Constitution demands, no less."

Differently from the trial judge, we find that the Harbor District is an administrative body and that its Board of Com-

missioners possesses in the greatest part administrative powers. The power to tax is a limited power and is restricted.

With modernization and transition, port facilities have created great problems in recent years. Their administration is of great import. Therefore, in 1968, the Legislature saw fit to enact a constitutional amendment, Art. XIV, Sec. 30.2(B), supra, providing for what it thought was an efficient means of appointment of the Board of Commissioners of the Harbor District. The appointments by the Governor are from divergent groups all representative of the business and industry of the Harbor District. The fact that the Governor must select at intervals one of three names submitted to him evidences a sense of fairness to the representative groups. The fact that appointments are spaced over a period of years also evidences a sense of fairness in that each group receives its turn for representation. We find that the groups named by the Legislature are inclusive and not discriminatory and that their composition is embracing of those interests vital to the progress and continuance of the Harbor District.

As stated supra, the instant constitutional amendment was voted on by the electorate of the Harbor District; they voiced their approval. Under such circumstances, we find no denial of equal protection of the laws. We find no deprivation of the right to vote for those who administer the Harbor District's business.

We conclude that the case of Sailors v. Board of Education of County of Kent, 387 U. S. 105, 87 S.Ct. 1549, 18 L.Ed. 2d 650, is applicable to the instant matter. In that case, the United States Supreme Court stated, "We find no constitu-

tional reason why state or local officers of the nonlegislative character involved here may not be chosen by the governor, by the legislature, or by some other appointive means rather than by an election."[3]

We do not find that this matter concerns the "one man-one vote" rule. It does not concern apportionment. The case of Avery v. Midland County, Texas, 390 U.S. 474, 88 S.Ct. 1114, 20 L.Ed. 2d 45, is therefore neither applicable nor apposite. That case involved the selection of Members of the Midland County Commissioners Court. After reviewing the matter in the light of Reynolds v. Sims, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506, supra, the United States Supreme Court held that plaintiff, as a resident of Midland County, had a right to a vote for the Commissioners Court of substantially equal weight to the vote of every other resident. It held that the selection of Members of the Court from single-member districts of substantially unequal population violated the Fourteenth Amendment to the United States Constitution. The

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[3] In the Sailors Case, plaintiffs sought to enjoin the Board of Education of Kent County from detaching certain schools from the City of Grand Rapids and attaching them to Kent County. They also sought to have the county board declared unconstitutionally constituted and to enjoin further elections until the electoral system was redesigned. The people of Michigan (qualified school electors) elected the local school boards. Each board sent a delegate to a biennial meeting, and the delegates elected a county board of five members, who needed not be members of the local boards, from candidates nominated by school electors. Among their powers, the county board had taxing powers. The United States Supreme Court upheld the manner of selecting the county boards, stating, "* * * For while there was an election here for the local school board, no constitutional complaint is raised respecting that election. Since the choice of members of the county school board did not involve an election and since none was required for these non-legislative offices, the principle of 'one man-one vote' has no relevancy."

Court further held that the Constitution permits no substantial variation from equal population in drawing districts for units of local government having general governmental powers over the entire geographic area served by the body. As found supra, such issues are not herein involved.

We find no invidious distinctions in the constitutional amendment under consideration. Invidious distinctions cannot be enacted without a violation of the Equal Protection Clause, but after considering the facts and circumstances of the amendment, the interests which the State is protecting, and the interests of the plaintiffs, we do not find that plaintiffs are suffering taxation without representation or are deprived of equal protection of the laws because they do not have a direct vote for Members of the Board of Commissioners of the Harbor District. Williams v. Rhodes, _____ U.S. _____, 89 S.Ct. 5, _____ L.Ed. 2d _____. CF. Cox v. State of Louisiana, 85 S.Ct. 453, 379 U.S. 536, 13 L.Ed2d 471; Robertson v. Ott, 284 F.Supp. 735.

"The burden of establishing the unconstitutionality of a statute rests upon the party who assails it. Thus, one who attacks the limited territorial scope or the classification of a statute has the burden of establishing that the restriction imposed by the Legislature has no rational basis. For the Court to nullify the statute, the record must show that no fair reason supports the legislative judgment." State v. Guidry, 247 La. 631, 173 So.2d 192. See, Francis v. Louisiana State Livestock Sanitary Bd., 184 So.2d 247, 249 La. 453, 187 So.2d 439. Herein, we do not find that plaintiffs have borne their burden of proving the unconstitutionality of the constitutional amendment; they have not shown that the selective process of appoint-

must to the Board of Commissioners of the Harbor District by Governor McKeithen has no rational basis.

In conclusion, we find that Art. XIV, Sec. 30.2(B), La. Const. of 1921, is constitutional. Plaintiffs have suffered neither discrimination nor denial of equal protection of the laws.

For the reasons assigned, the judgment of the trial court is reversed and set aside. Plaintiffs' suit is dismissed at their costs.

ARTICLE XIV, SECTION 30.2(B) OF THE LOUISIANA CONSTITUTION OF 1921

§ 30.2 Lake Charles Harbor and Terminal District; ratification; Board of Commissioners, members, officers, agents and employees

Section 30.2 A. Ratification of Law. The Act passed by the Legislature of 1924 creating the Lake Charles Harbor and Terminal District shall be deemed and held to be ratified, confirmed and put into operation by the adoption of this Constitutional Amendment in the manner provided by law.

B. The governing authority of this district shall be a board of commissioners whose members shall be appointed by the governor and which shall be known as the Board of Commissioners of Lake Charles Harbor and Terminal District. The board shall consist of five members who shall be citizens of the United States and qualified voters and taxpayers, and inhabitants of said district during their terms of office. The commissioners shall serve overlapping terms, as established by Act No. 67 of 1924, of six years each. The present members shall continue to serve on the board for the duration of their respective terms. Any vacancies in the membership of the board hereafter occurring by reason of expiration of the terms for which appointed, or by reason of death, resignation or otherwise shall be filled in the following manner:

(1). The first vacancy on the board shall be filled by appointment by the governor, with the advice and consent of the senate, from a list of three nominees submitted to the governor by the central office of the American Rice Growers Cooperative Association at Lake Charles, Louisiana.

(2). The next vacancy on the board shall be filled by appointment by the governor, with the advice and consent of the senate, from a list of three nominees submitted to the governor by the Lake Charles and Vicinity Central Trades & Labor Council, AFL-CIO, as one organization.

(3). The next vacancy on the board shall be filled by appointment by the governor, with the advice and consent of the senate, from a list of three nominees submitted to the governor by the Lake Charles Maritime Association.

(4). The next vacancy on the board shall be filled by appointment by the governor, with the advice and consent of the senate, from a list of three nominees submitted to the governor by the Greater Lake Charles Chamber of Commerce, and the West Calcasieu Chamber of Commerce acting as one organization.

(5). The next vacancy on the board shall be filled by appointment by the governor, with the advice and consent of the senate, from a list of three nominees submitted to the governor by the state senators and representatives in the legislature representing the parish of Calcasieu.

(6). Any further vacancies shall be filled in the same order of rotation as shown in subsections (1) through (5) of Section B hereof.

(7). If now, or hereafter, one or more of the five organizations or groups set forth above has no commissioner on the board, the governor, the board, and the five organizations shall proceed to rectify this failure of representation of one or more groups by diverting, in case of a vacancy, from the

order of appointments named hereinabove and by receiving nominations instead from the unrepresented organizations or groups, and then thereafter, shall revert to the order of nominations and appointments, as set forth in sub-paragraphs (1) through (5) above. If more than one of the five organizations are unrepresented on the board, priorities shall be in the order of rotation as shown in sub-paragraphs (1) through (5) above, with the American Rice Growers Cooperative Association having first priority in submitting nominees to the governor, the Lake Charles and Vicinity Central Trades & Labor Council, AFL-CIO shall have second priority, the Lake Charles Maritime Association shall have third priority, the Greater Lake Charles Chamber of Commerce and the West Calcasieu Chamber of Commerce acting as one organization shall have fourth priority, and the Louisiana Legislators representing Calcasieu Parish shall have fifth priority. It is the intention of this language that the purpose of providing one commissioner for each organization shall be corrected and rectified at the earliest possible date, and at the time of the earliest possible vacancy. To facilitate this transition each of the five organizations shall, within 30 days after the promulgation of this amendment, notify both the governor and the board of commissioners whether it has, or has not been provided with a commissioner on the effective date of this amendment, with the name of such commissioner if it has one; and if it has none, it shall so certify such fact to the governor and to the board of commissioners.

(8). The organizations referred to in Subsection B above shall be understood and construed to be the five organizations presently existing in the city of Lake Charles by the designated names, or their respective legal successors.

(9). If any one or more of the organizations referred to in Subsection B hereof ceases to exist or to function without any legal successor, then the nominees to be submitted to the governor by such organization shall instead be submitted by the state senators and representatives representing the parish of Calcasieu.

(10). In the event that for any reason the governor fails to receive three nominees for a given vacancy, as provided in Subsection B above, within sixty days after the expiration of the term of any member of the board or the occurrence of a vacancy on the board from any other cause, the governor shall proceed forthwith to make an appointment to fill such vacancy. The organization failing to submit such nominees shall lose its turn in the rotation.

(11). Any commissioner may be removed by the governor, but only for cause and on charges preferred against him in writing and after public hearing and proof of the sufficiency of such charges; provided that any commissioner so removed shall have the right to test in the courts the sufficiency of the charges and of the evidence tendered in support thereof.

(12). The commissioners shall serve without compensation and shall have the power to organize and reorganize legal, executive, engineering, clerical and other departments and forces of the said board and to fix the duties, powers and compensation of all officers, agents and employees of said board. (Amended by Acts 1968, No. 708, adopted Nov. 5, 1968.)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1046

EDMOND J. HAMILTON and JOHN L. DATENHOFF,
Appellants,

v.

JOHN J. McKEITHEN, GOVERNOR OF THE STATE OF LOUISIANA, *Appellee,*

AMERICAN RICE GROWERS COOPERATIVE ASSOCIATION, LAKE CHARLES MARITIME ASSOCIATION, GREATER LAKE CHARLES CHAMBER OF COMMERCE, WEST CALCASIEU CHAMBER OF COMMERCE, JESSE M. KNOWLES, A. C. CLEMONS, JR., HARRY M. HOLLINS, ROBERT G. JONES, WILLIAM L. McLEOD, JR., WILLIAM S. BOYD, and CONWAY LEBLEU, *Intervenors-Appellees.*

On Appeal From the Supreme Court of the State of Louisiana

MOTION TO DISMISS OR AFFIRM

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On Appeal From the Supreme Court of the State of Louisiana

MOTION TO DISMISS OR AFFIRM

The appellees, JOHN J. McKEITHEN, Governor of the State of Louisiana, AMERICAN RICE GROWERS COOPERATIVE ASSOCIATION, LAKE CHARLES MARITIME ASSOCIATION, GREATER LAKE CHARLES CHAMBER OF COMMERCE, WEST CALCASIEU CHAMBER OF COMMERCE,

JESSE M. KNOWLES, A. C. CLEMONS, JR., HARRY M. HOLLINS, ROBERT G. JONES, WILLIAM L. MCLEOD, JR., WILLIAM S. BOYD, and CONWAY LEBLEU, move the court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of the State of Louisiana on the ground that the case was not timely docketed and on the further ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

I.

THE STATE LAW INVOLVED AND THE NATURE OF THE CASE

A. The State Law

This appeal raises the question of the validity of Article 14, Section 30.2(b) of the Constitution of the State of Louisiana, providing for the method of selecting members of the Board of Commissioners of the Lake Charles Harbor & Terminal District.

The Lake Charles Harbor & Terminal District is a political subdivision of the State of Louisiana created by Act 67 of 1924, now Louisiana Revised Statutes 34:201, et seq. The governing body of the district is the Board of Commissioners and its purpose is the operation of the Port of Lake Charles. The powers of the Board of Commissioners (commonly known as the Lake Charles Dock Board) are set out in Louisiana Revised Statutes 34:203. The creation of the Lake Charles Harbor & Terminal District was ratified by constitutional amendment proposed by Act 55 of 1924 and adopted by the people on November 4, 1924. This constitutional provision is now Article 14, Sec-

tion 30.2(a) of the Constitution of the State of Louisiana, which reads as follows:

> "The act passed by the Legislature of 1924 creating the Lake Charles Harbor & Terminal District shall be deemed and held to be ratified, confirmed and put into operation by the adoption of this constitutional amendment in the manner provided by law."

The present method of selecting members to the Board of Commissioners of the Lake Charles Harbor & Terminal District was proposed as a constitutional amendment by Act 708 of 1968, which was adopted by the people on November 5, 1968, and which is now Article 14, Section 30.2(b) of the Constitution of the State of Louisiana. It is this latter provision providing for the method of selecting members to the Board of Commissioners which is alleged to be contrary to the Constitution of the United States and particularly the due process and equal protection clauses of the Fourteenth Amendment.

The Louisiana constitutional provision here under attack provides that the Board of Commissioners shall consist of five members and that vacancies on the Board of Commissioners shall be filled by the Governor from a list of three nominees submitted successively by the American Rice Growers Cooperative Association, the Lake Charles and Vicinity Central Trades & Labor Council, AFL-CIO, the Lake Charles Maritime Association, the Greater Lake Charles Chamber of Commerce and the West Calcasieu Chamber of Commerce as one organization, and the state senators and representatives in the legislature representing the Parish of Calcasieu.

B. The Proceedings Below

Appellants filed this suit against John J. McKeithen, Governor of the State of Louisiana, in the Nineteenth Judicial District Court of the State of Louisiana for the Parish of East Baton Rouge, seeking to have that court declare Article 14, Section 30.2(b) of the Constitution of the State of Louisiana to be "illegal and unconstitutional", and seeking to enjoin the defendant from filling the vacancy then existing on the Board of Commissioners of the District under the procedures set out in the constitutional provision. Four of the nominating groups provided for in the constitutional provision under attack intervened in the suit and joined the Governor in defending the suit and the validity of the constitutional provision in question. The trial court declared the provision unconstitutional whereupon the defendant and intervenors appealed to the Supreme Court of the State of Louisiana.

In a unanimous decision, the Supreme Court of the State of Louisiana reversed the trial court and held the constitutional provision in question to be valid. Plaintiffs' application for rehearing was refused by the Supreme Court of the State of Louisiana on October 8, 1969. *Hamilton* v. *McKeithen*, 254 La. 683; 226 So.2d 494 (1969). Plaintiffs filed a notice of appeal to this Court on December 10, 1969. The case was docketed in this Court on January 8, 1970.

II.

ARGUMENT

A. Appellants Did Not Docket This Case Within the Delay Provided by Rule 13 (1)

As appellants state in their notice of appeal to this Court, their appeal is "from the final judgment of the Supreme Court of the State of Louisiana entered in this suit on the 8th day of October, 1969 (said judgment having been initially rendered herein on the 8th day of June, 1969, and finality thereof having been suspended by the timely filing of an application for rehearing, which application for rehearing was denied on October 8, 1969)". The notice of appeal was timely filed but this Court's Rule 13(1) further requires that appellants docket the case within ninety (90) days after entry of the judgment appealed from, i.e. not later than January 6, 1970. This case was not docketed until January 8, 1970. Appellants did not secure an extension of time from a justice of this Court as authorized by the rule.

This Court has discretion to overlook a failure to comply with its rules. However, in this case, appellants' jurisdictional statement is silent on the subject of timeliness of docketing and (to appellees' knowledge) no explanation accompanied the untimely docketing of appeal. In the case of *Pittsburgh Towing Company* v. *Mississippi Valley Barge Line Company*, 385 U.S. 32, 87 S.Ct. 195 (1966), this Court dismissed an appeal under similar circumstances noting that "if there are to be rules, there must be some limit to our willingness to overlook their violation". It is to be noted that in the case of *Johnson* v. *Florida*, 391 U.S. 596, 88 S.Ct. 1013 (1968), this Court did not dismiss the appeal although the case had not been timely

docketed. However, *Johnson* was a criminal case and it is submitted that there is more reason to overlook a failure to comply with court rules where an individual's liberty is at stake than there is in a civil case such as *Pittsburgh Towing Company* and the instant case.

Appellees are informed that appellants will file a supplemental jurisdictional statement claiming that the record was delayed or missent in transit. It is submitted that it is the responsibility of the appellants to see that the record is delivered to the Clerk of this Court within the delay allowed or to secure an extension of time from a justice of this Court in the event of mishap. Such an excuse as this is no more valid than the excuse claimed in *Pittsburgh Towing Company* that "delay was occasioned by a misunderstanding between counsel for appellant" and it should be similarly rejected.

Should this Court choose to overlook appellants' failure to timely docket the case, the appeal should nevertheless be dismissed (or the judgment below affirmed) because of the unsubstantiality of the questions presented for the reasons hereinafter set forth.

B. The "One Man-One Vote" Doctrine Has No Relevance to This Case

The state constitutional provision here under attack provides that the governing board charged with operation of the Port of Lake Charles is to be composed of members appointed by the Governor from lists of nominees submitted by certain nominating groups, some of which are unofficial organizations. There are substantial and rational relations between the nominating groups and the functions which the ultimate ap-

pointees are to perform and accordingly the selection procedure is valid under the traditional tests of constitutionality, all as shown by Section C, below. Because of the fact that the appointive procedure here under attack so clearly meets the tests laid down in the jurisprudence cited in Section C below, appellants seek to rely on the "one man-one vote" doctrine established by this Honorable Court in *Reynolds* v. *Sims*, 377 U.S. 533, 84 S.Ct. 1362 (1964).

The "one man-one vote" doctrine clearly has no relevance to this case under the holding in *Sailors* v. *Board of Education of the County of Kent*, 387 U.S. 105, 87 S.Ct. 1549 (1967).

This Honorable Court found that the method of selecting members to the Kent County Board of Education was appointive rather than elective and that the functions of the board were administrative rather than legislative. It was held that where these two factors are present, the principle of "one man-one vote" has no relevancy and the constitutionality of the selection procedure was upheld.

The following language of this court is pertinent:

> "We find no constitutional reason why state or local officers of the nonlegislative character involved here may not be chosen by the governor, by the legislature, *or by some other appointive means* rather than by an election. Our cases have, in the main, dealt with elections for United States Senator or Congressman.
>
> * * *
>
> "They were all cases where elections had been provided and cast no light on when a State must provide for the election of local officials.
>
> * * *

"The science of government is the most abstruse of all sciences; if, indeed, that can be called a science which has but few fixed principles, and practically consists in little more than the exercise of a sound discretion applied to the exigencies of the state as they arise. It is the science of experiment.

"When we stated . . . the state legislatures have constitutional authority to experiment with new techniques, we were talking about the Due Process Clause of the Fourteenth Amendment, . . .

"*The Michigan system for selecting members of the county school board is basically appointive rather than elective.* We need not decide at the present time whether a state may constitute a local legislative body through the appointive rather than the elective process. . . . We do not have that question here, *as the County Board of Education performs essentially administrative functions; and while they are important, they are not legislative in the classical sense.*

"*Viable local governments may need many innovations, numerous combinations of old and new devices,* great flexibility in municipal arrangements to meet changing urban conditions. *We see nothing in the Constitution to prevent experimentation.* At least as respects nonlegislative officers, *a State can appoint local officials or elect them or combine the elective and appointive systems as was done here. . . . Since the choice of members of the county school board did not involve an election and since none was required for these nonlegislative offices, the principle of 'one man, one vote' has no relevancy.*" (Emphasis added.)

Certainly the Lake Charles Dock Board is appointive rather than elective. The *Sailors* case dealt with a procedure whereby the elected local school boards

selected delegates who in turn selected the members of the county board. This Court, in *Sailors,* recognized that this was a combination of "the elective and appointive systems" but concluded that it was "basically appointive rather than elective" so that the "one man-one vote" doctrine was irrelevant. In other words, the closer any selection procedure comes to being elective, the more likely it is that the "one man-one vote" doctrine will be applicable. The obviously appointive procedure for selecting members to the Lake Charles Dock Board meets this test of the *Sailors* case more clearly than the situation which was before this Court in *Sailors.*

The Board of Commissioners of the Lake Charles Harbor and Terminal District is a single purpose entity with its only function being the operation of the Port of Lake Charles and matters incidental thereto. Although the operation of the port has an indirect effect upon the people living within the harbor and terminal district as well as on the people of the surrounding area, it certainly does not have the direct vital effect upon the people which results from the activities of a county school board charged with responsibility for the education of their children. If the activities of the Kent County Board of Education were administrative rather than legislative, then it is patently obvious that the activities of the Board of Commissioners of the Lake Charles Harbor and Terminal District are likewise administrative rather than legislative. The decision of the Louisiana Supreme Court to the effect that the board is an administrative body is not seriously challenged by appellants in their jurisdictional statement. Accordingly, it is clear that both requirements of *Sailors* are present in this case and the "one man-one vote" doctrine has no relevance.

The case of *Avery* v. *Midland County*, 390 U.S. 474, 88 S.Ct. 1114, 20 L.Ed. 2d 45 (1968), relied on by appellants, is consistent with *Sailors* and cites it with approval. It is clearly distinguishable from the instant case. *Avery* was a reappointment suit against the Midland County Commissioners Court, the general governing body of the county. This body consisted of five members, one *elected* at large and four *elected* by districts. One district included the city of Midland and contained 95% of the county's population. The remaining three districts (which elected a majority of the body) contained only five percent of the population. Reapportionment was ordered. The "one man-one vote" rule was applicable because both tests laid down in *Sailors* were met, whereas neither test is met in ~~our~~ case. The Commissioner's Court in *Avery* was an elective body whereas the Kent County Board of Education and the Lake Charles Dock Board are appointive. The Commissioner's Court was a legislative body, whereas the Kent County Board of Education and the Lake Charles Dock Board are administrative bodies.

In addition to *Avery*, appellants rely on the case of *Kramer* v. *Union Free School District No. 15*, — U.S. —, 89 S.Ct. 1886 (1969), and to a lesser extent on *Cipriano* v. *City of Houma*, — U.S. —, 89 S.Ct. 1897 (1969).

In the *Kramer* case, the plaintiff sought the right to vote in the election for the local board of Union Free School District 15 of the State of New York. This Honorable Court carefully pointed out that New York provides three methods of school board selection and that only the last of those three methods was involved in the case. In some large city districts, the school

board is appointed by the Mayor or City Council. This situation was not before the court. Had it been, the case could have had a bearing on the Lake Charles Dock Board situation.

At least one of the large city school districts, that of the City of New York, is appointed by the Mayor from a list of nominees submitted by a selection board consisting of the heads of the three universities located in New York City and the presidents of eight other organizations representing educational, civic, business, labor and professional groups interested in city affairs, including education. These organizations include the New York Central Trade and Labor Council and the Commerce and Industry Association of New York, Inc. See *Lanza* v. *Wagner*, 183 NE 2d 670 (New York, 1962); appeal dismissed 371 U.S. 74, 83 S.Ct. 177 (1962); certiorari denied 371 U.S. 901, 83 S.Ct. 205 (1962). The *Kramer* case does not deal with this procedure for choosing members for the New York City School Board and does not cast any doubt whatsoever on the validity of such procedure which is substantially similar to the procedure for selecting members to the Lake Charles Dock Board. It is to be noted that in the *Lanza* case, the highest court of the State of New York held the statute to be constitutional and this Honorable Court refused to review that decision.

A second method for selecting school boards is employed in certain New York cities primarily those with less than 125,000 residents. In these districts, the school board is elected at general municipal elections in which all qualified city voters may participate. Again this method of selecting New York school boards was not before the court.

In other districts, such as the one involved in the *Kramer* case, which are primarily rural and suburban, "the school board is *elected* at an annual meeting of qualified school district voters." (89 S.Ct. 1886, 1887, emphasis added) However, in these elections a person otherwise eligible to vote in general elections is disqualified unless he is (1) the owner or lessee of taxable real property located in the district, or (2) the spouse of one who owns or leases qualifying property, or (3) a parent or guardian of a child enrolled for a specified time during the preceding year in a local district school. The plaintiff in the *Kramer* case was ineligible to vote in these elections because he was a bachelor living with his parents and therefore was excluded from those permitted to vote in the election.

This court stated that that "state apportionment statutes, which may *dilute* the effectiveness of some citizens' votes, receive close scrutiny in this court, *Reynolds* v. *Sims, supra.*" See *Avery* v. *Midland County*, 390 U.S. 474, 494, 88 S.Ct. 1114, 1125, 20 L.Ed. 2d 45 (1968). No less rigid an examination is applicable to statutes *denying* the franchise to citizens who are otherwise qualified by residence and age." (89 S.Ct. 1886, 1889) This Court concluded that the selective distribution of the *franchise* involved in the case before it permitted "inclusion of many persons who have, at best, a remote and indirect interest, in school affairs and on the other hand, exclude others who have a distinct and direct interest in the school meeting decisions." (89 S.Ct. 1886, 1892) Accordingly this Honorable Court reversed the decision of the lower court which had upheld the validity of the statute and in effect required that the plaintiff be permitted to

vote in the election for members of the school board of Union Free School District No. 15. It can be seen that *Kramer* is merely an extension of the "One Man-One Vote" doctrine that this Court has evolved over recent years. If a person's vote may not be diluted merely because he lives in an urban rather than a rural area (as in *Reynolds* v. *Sims*), then he may not be denied the right to vote in school elections simply because he does not own or lease property or have children in school. The *Kramer* decision is clearly limited to the right to *vote* in an *election*. Every one of the one man-one vote decisions has dealt with an election and have clearly been limited to elections.

The case of *Sailors* v. *Kent Board of Education*, *supra*, clearly held that an administrative body, such as the Lake Charles Dock Board may be chosen by appointment rather than by election and when such a body is selected by the appointive process, the "One Man-One Vote" doctrine has no relevancy. As shown by the quotation from the *Kramer* case at page 15 of appellants' jurisdictional statement, the rule laid down in *Sailors* remains the law and was cited with approval:

> "States do have latitude in determining whether certain public officials shall be selected by appointment and whether various questions shall be submitted to the voters. In fact, we have held that where a county school board is an administrative, not legislative, body, its members need not be elected. Sailors v. Kent Board of Education, 387 U.S. 105, 108 (1967). However, '*once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Production Clause of the Fourteenth Amendment.*'" (Emphasis supplied by appellants in their jurisdictional statement)

The entire argument made by the appellants is based on the false premise which they state at page 14 of their jurisdictional statement as follows: "In the present case although an appointment is made by the Governor, a franchise has been granted to a limited number of private groups to designate the panels from which the Governor must appoint." Clearly no "franchise" has been granted in this case. A franchise is only granted for an election and it is patently obvious that the members of the Lake Charles Dock Board are chosen by appointment, not by election. A simple reading of the above quotation makes it crystal clear that when this court speaks of "the franchise" being granted it is talking about an office being made elective rather than appointive. This court first says that the states have latitude in determining "whether certain public officials shall be selected by election or chosen by appointment". It then adds, "once the franchise is granted to the electorate", that is, once it is decided by the state that the office shall be elective rather than appointive, then "lines may not be drawn which are inconsistent with the Equal Protection Clause" in determining who can vote in the election. Not only does the context in which the word "franchise" was used show that the court was talking about an election, by simple definition the word franchise is applicable only to an election and the right to vote therein. Black's Law Dictionary defines franchise in this sense as follows: "The right of suffrage; the right or privilege of voting in public elections." Black's Law Dictionary, Fourth Edition, page 786. Corpus Juris Secundum defines franchise in this sense as "The right or privilege of qualified elector or voter to cast his ballot freely in favor of the man of his choice in an election authorized by law to be held." 29 Corpus

Juris Secundum 28. It would be ridiculous to say that the members of the Lake Charles Dock Board who are appointed by the Governor from panels furnished by a cross section of organizations interested in the operation of the Port of Lake Charles are chosen by a "public election" or "an election authorized by law to be held". Accordingly, appellants' position that a "franchise" has been granted is untenable and the remainder of their argument based on that premise falls with it.

Appellants (at page 12 of their jurisdictional statement) quote the *Kramer* case as holding that "any unjustifiable discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government." The meaning of this sentence is clearly determined by reading the two preceding sentences: "'[S]ince the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the *right of citizens to vote* must be carefully and meticulously scrutinized.' This careful examination is necessary because statutes distributing the *franchise* constitute the foundation of our representative society." (Emphasis added and citations omitted). Clearly, when this Court is talking about the right to "participate in political affairs or in the selection of public officials" it is talking about the right to cast a ballot in an election held for the purpose of determining political questions or electing public officials.

The appellants also rely on *Cipriano* v. *City of Houma*, — U.S. —, 89 S.Ct. 1897 (1969). The *Cipriano* case is even more clearly distinguishable

from the instant case than is the *Kramer* case. The *Cipriano* case involved an election to authorize the issuance of revenue bonds to be paid from the operation of public utilities. Under the statute in question, only property owners were allowed to vote. The plaintiff was not a property owner, but claimed that there was no rational basis for excluding him from the franchise. This Honorable Court held the statute unconstitutional. It held that the exclusion of non-property owners was not necessary to promote a compelling state interest and that it was immaterial that "the question scheduled for the election need not have been submitted to the voters." Accordingly, the case follows *Kramer* to the effect that once an election is called, persons otherwise qualified to vote must be allowed to participate in the election unless their "exclusions are necessary to promote a compelling state interest." *Cipriano,* like all of the other "One Man-One Vote" decisions, dealt with an election and the right to vote and the principles stated therein are applicable only to elected offices. They have no relevancy to appointive offices, such as the Lake Charles Dock Board.

C. The Decision of the Supreme Court of Louisiana Is Clearly Correct and No Substantial Federal Question Is Presented in This Appeal

Once it is decided that the "One Man-One Vote" doctrine is inapplicable, it is crystal clear that there is no constitutional prohibition against the delegation of such powers as those involved here to a board selected under the procedures here attacked. It has been so held by the highest appellate court of the State of New York in a decision which this Honorable Court refuses to review. *Lanza* v. *Wagner,* 183 NE 2d 670

(New York, 1962), appeal dismissed 371 U.S. 74, 83 S.Ct. 177 (1962), certiorari denied 371 U.S. 901, 83 S.Ct. 205 (1962). The *Lanza* case was an attack upon a statute which shortened the terms of members of the Board of Education of the City of New York and provided for the appointment by the mayor of new members of the board as well as of their successors from a list of nominees to be submitted to him by a selection board consisting of the heads of the three universities located in New York City, and the presidents of eight other organizations representing educational, civic, business, labor and professional groups interested in city affairs, including education. These organizations include the New York Central Trades and Labor Council and the Commerce & Industry Association of New York, Inc. The court held that the statute was constitutional. It noted that the technique of designating a representative panel of responsible and knowledgeable persons to assist the appointing power by submitting a list of eminently qualified nominees from among whom the appointments were to be made was by no means a novel one in New York (nor is such a procedure novel in Louisiana). Whether the selection board was regarded as private or public, the Court could perceive of no constitutional bar to the legislative designation of a nominating panel made up of people representing a knowledgeable cross section of the city, either active or vitally interested in the educational life of the city, who could reasonably be expected to present to the mayor on an objective and nonpartisan basis, the names of individuals exceptionally qualified for service on the Board of Education.

The rule as to how far a state may go in permitting nominations of public officials from private organiza-

tions is well stated in the case of *Ashmore* v. *Greater Greenville Sewer District*, 44 SE 2d 88 (South Carolina, 1947). The statute in question in that case provided for the creation of a political subdivision for the erection, maintenance and management of an auditorium and issuance of bonds therefor through a board of trustees which would be composed of certain political officers and representatives from a number of organizations including the Lions, Rotary, Kiwanis, Exchange, Optimist, and Altrusa Clubs, all such representatives to be directly elected to the board by their respective groups. The court found that the logical and reasonable solution of the problem was to follow the rule that where there is little or no relation between the unofficial persons, bodies or organizations to whom the power of nomination, appointment or election is attempted to be delegated, and the law to be administered, the legislative provisions so purporting are invalid because of such lack of substantial and rational relations between the appointive or elective power and the function of government which the appointees or electees are to perform. Departure from this concept, the court stated, would be discriminatory to the degree of violation of the "equal protection" and "due process" clauses of the *state* constitution. The court could find no substantial or rational relationship between the various organizations named in the statute and the construction and operation of a public auditorium, and thus found the statute unconstitutional.

The above rule was again applied by the same court in the case of *Floyd* v. *Thornton*, 68 SE 2d 334 (South Carolina, 1951). That case involved a statute providing for the appointment of members of a board of bank

control from names recommended by the state bankers association. The court said that they could conceive of no case where there would be a more rational and substantial relation to the law to be administered by the appointees than that involved in the statute under consideration, the state bankers association obviously being an organization especially qualified for the selection of men to be appointed to the board of bank control. The nominating groups in the constitutional amendment under attack in this case have an equally strong relationship to the purposes and powers of the Lake Charles Dock Board.

The nationwide jurisprudence on this problem is covered in an annotation on the validity of delegation to private persons or organizations of power to appoint or nominate to public office in 97 A.L.R. 2d 361, et seq. Suffice it to say that the vast weight of authority is that the delegation of such nominating powers to private organizations of the type provided for in this constitutional amendment is perfectly valid under the constitutional provisions of the United States and the various states.

There are such substantial and rational relations between the five groups charged with furnishing nominees for appointment to the Lake Charles Dock Board and the functions of government performed by the board (operation of the Port of Lake Charles) that this appointive process unquestionably meets the traditional tests of constitutional validity set out above.

(a) The American Rice Growers Cooperative Association is composed of the rice producers of the area surrounding and served by the Port of Lake Charles. The bulk of the rice shipped by said producers is

shipped through the Port of Lake Charles and rice shipments constitute fifty per centum (50%) or more of the dry cargo shipped through the Port of Lake Charles by all users thereof. Said organization actively sponsored the construction of the Calcasieu Deep Water Channel and the creation of the Lake Charles Harbor and Terminal District and has always maintained a keen interest in the operation of the port and in the related activities of the board, because of the value to its members of the port's facilities, which make available foreign markets and lower transportation rates for their produce. (Exhibits D-2 and D-3 in evidence herein; see TR 67-72)

(b) The Lake Charles and Vicinity Central Trades and Labor Council, AFL-CIO, is an organization comprising most of the labor unions of Calcasieu Parish. Accordingly, said organization represents most of the working men of Calcasieu Parish. The economic well-being of Calcasieu Parish and its industrial development and resulting labor needs are in a large measure dependent upon the success and efficient operation of the port, and accordingly the well-being of the working men of Calcasieu Parish is inextricably related to the operation of the port and the related activities of the board.

(c) The Lake Charles Maritime Association is a voluntary association of all persons engaged at Lake Charles, Louisiana, either as principal, agent or employee-representative of all concerns engaged in the businesses of shipping, forwarding, stevedoring, chartering and brokering of commodities and cargo through the Port of Lake Charles, Louisiana. The association is daily in direct contact with the managing and operating personnel of the port and with its physical facili-

ties. Being in the businesses which generate and develop the traffic and commerce of the port and the district, the members of this association have and maintain vital concern with reference to the management of the district. Necessarily, they have peculiar expertise and knowledge (which is made available to the port authorities) concerning the maintenance, upkeep, operation and expansion of the port facilities and concerning the advantageous promotion and development of the traffic and commerce that flow through the port, all of which is within the function and management of the Board of Commissioners of the Lake Charles Harbor and Terminal District. (Exhibits D-1 and LCM-1 in evidence herein; see TR 67-72)

(d) The Greater Lake Charles Chamber of Commerce is composed of the business and professional people of Lake Charles and the vicinity within the Lake Charles Harbor and Terminal District. Membership in the Chamber is open to all such business and professional people of the area. The Chamber took a leading part in securing the construction of the Lake Charles Deep Water Channel and the creation of the harbor and terminal district. The Chamber has continued to take a strong interest in the operation of the port and the related activities of the board because of the port's importance as an essential factor in the growth and development of the vicinity and to the welfare of its citizens. Accordingly, it has at all times maintained a standing and functioning committee solely devoted to the activities of the harbor and terminal district. (Exhibit D-4 and D-5 in evidence herein; see TR 67-72)

The West Calcasieu Chamber of Commerce is composed of the business and professional people residing

or in business in that portion of Calcasieu Parish situated west of the Calcasieu River. Membership in the chamber is open to all such business and professional people. The welfare of the business and professional community of West Calcasieu, as well as of Lake Charles and vicinity, is tied to the success of the port, inasmuch as the economic well-being of the entire area is in a large measure dependent upon the success and efficient operation of the port. (Exhibit D-6 in evidence herein; see TR 67-72)

(c) The state senators and representatives in the legislature representing the Parish of Calcasieu are elected from senatorial and representatives districts, each of which includes the entire area of the Lake Charles Harbor and Terminal District. Accordingly, they represent all of the people of the district as well as the people of the surrounding area and are charged with the duty to assist, legislatively and otherwise, in providing for the efficient operation of the port. The welfare of the constituents of the said state senators and representatives is tied to the success of the port.

Although the nominating procedure here under attack would clearly meet the test laid down in the *Ashmore* case (as well as of the other cases discussed above), it is interesting to note that in *Ashmore* the private organizations chose the members of the board directly. In our case the private organizations can only submit nominees from among whom the governor makes the appointemnt. The annotation at 97 ALR 2d 361 et seq. deals with attacks on both the *appointive procedure* and the *nominative procedure*. Although there are a few cases cited in that annotation where the *direct appointment* procedure was struck down as in *Ashmore*, all of the cases upheld the validity of the

nominative procedure with one exception. The only exception was in Florida where there was a provision of the state constitution which required those officials to be chosen by election by the people or by appointment by the governor. It was held that under this provision, the legislature could not limit the governor's power of appointment. Of course, there is no such provision in the Louisiana constitution but, on the contrary, the appointive procedure here under attack is written into the constitution. Thus, the Florida cases are not pertinent here, whereas the other cases which have, without exception, held such nominating procedures to be valid, are pertinent. See 97 ALR 2d 372-378.

III.

CONCLUSION

Appellants herein did not timely docket this case. It is submitted that their appeal should be dismissed for this reason.

Moreover, the procedure of selecting members of boards and commissions from lists of nominees submitted by unofficial organizations is constitutionally valid where there are substantial and rational relations between the nominating groups and the law to be administered under the authorities cited in 97 ALR 2d 361. There are such substantial and rational relations in this case. Nothing in the *Reynolds, Avery, Kramer* and *Cipriano* cases prohibits the selection of members to the Lake Charles Dock Board by such procedures. On the contrary, the *Sailors* decision is clear authority for the proposition that the "One Man-One Vote" doctrine has no relevance to this case.

WHEREFORE, appellees respectfully submit that the questions upon which this cause depend are so un-

substantial as not to need further argument, and appellees respectfully move the court to dismiss this appeal or, in the alternative, to affirm the judgment entered in the cause by the Supreme Court of the State of Louisiana.

Respectfully submitted,

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SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 1046

EDMOND J. HAMILTON and
JOHN L. DATENHOFF,

Appellants,

versus

JOHN J. McKEITHEN, GOVERNOR OF THE STATE OF LOUISIANA,

Appellee.

On Appeal from the Supreme Court of the State of Louisiana

SUPPLEMENTAL JURISDICTIONAL STATEMENT ON BEHALF OF EDMOND J. HAMILTON and JOHN L. DATENHOFF, APPELLANTS

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SUPPLEMENTAL JURISDICTIONAL STATEMENT

The present supplemental jurisdictional statement is filed for the purpose of explaining to the Court the reasons for the

untimely docketing of this appeal on January 8, 1970, rather than on or prior to January 6, 1970, the latter date being the date upon which the ninety (90) day period provided by Rule 13(1) of this Court for the docketing of the appeal expired.

There is annexed hereto and made a part hereof as an appendix an affidavit executed by present counsel showing the circumstances under which the record, printed briefs, and check for costs were transmitted to this Court. This affidavit reveals that counsel on December 24, 1969, twelve (12) days before the expiration of the ninety (90) day period for docketing the appeal, directed a letter of transmittal to the Clerk of the Supreme Court of the United States together with a check in the amount of $100.00 for costs. This letter and check were placed in the shipping box with the certified record, consisting of two volumes, which had been received from the Louisiana Supreme Court together with one signed copy and thirty-nine (39) additional copies of the jurisdictional statement. This shipping box was securely sealed with preglued brown sealing paper and wrapped with heavy cord, and was properly addressed to the Supreme Court of the United States, Supreme Court Building, Washington, D.C. At about 4:45 P.M., on December 24, 1969, counsel left his office at 1730 Main Street, Baton Rouge, Louisiana, en route to the United States Post Office which was located some ten (10) blocks away. Counsel arrived at the Post Office shortly after the closing time. Counsel thereupon utilized the self-service mailing facilities at the Post Office, weighed the package, affixed sufficient postage, obtained a vended postal insurance record for third class mailing, and placed the box in the inside package mailing drawer in the Post Office.

Counsel on January 7, 1970, not having received any

acknowledgment from the Clerk of the United States Supreme Court, called the Jurisdictional Statement Docketing Department in the Clerk's office of the United States Supreme Court, and talked to one Mrs. Lazowski for twenty (20) minutes. Counsel was informed that the record and jurisdictional statement had not been received at the Clerk's Office, nor had the matter been docketed.

On January 8, 1970, counsel received a call from the said Mrs. Lazowski stating that the record and thirty-nine copies of the jurisdictional statement had been received in a damaged condition with a notation stamped thereon, "Damaged in the Mail." Counsel at that time requested that the case be docketed, if possible, and stated that a supplemental jurisdictional statement would be forwarded at the earliest possible date to explain the circumstances concerning the mailing of the transcript and jurisdictional statement.

This Court, in its discretion, has the right to waive the consequences of an untimely docketing. *Pittsburgh Towing Co. v. Mississippi Val. Barge Line Co.*, 385 U.S. 32, 87 S. Ct. 195 (1966). Justice Black in his dissenting opinion in this case said the following:

> "As I have previously stated, '"The filing of court papers on time is, of course, important in our court system. But lawsuits are not conducted to reward the litigant whose lawyer is most diligent or to punish the litigant whose lawyer is careless. Procedural paper requirements should never stand as a series of dangerous hazards to the achievement of justice through a fair trial on the merits."' Beaufort Concrete Co., supra, 384 U.S. at 1006, 86 S. Ct. at 1910, Black J., dissenting. The conflict between the interest of the court clerk in the timely filing

of papers and the interest of the citizen in having his lawsuit tried should be resolved in favor of the citizen, not the court clerk. I would not dismiss this case for violation of Rule 13(1)."

It is respectfully submitted that there was no lack of due diligence on the part of counsel, and that this Court, in the exercise of its sound discretion, should waive the consequences of the untimely docketing of this appeal, and that plenary consideration should be given this case to resolve the important Federal question herein presented, with briefs on the merits and oral argument, and a final decision by this Court.

Respectfully submitted,

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STATE OF LOUISIANA
PARISH OF EAST BATON ROUGE

BEFORE ME, the undersigned authority, personally came and appeared, C. ALVIN TYLER, who, after being duly sworn, deposed and said:

That he is an attorney at law duly admitted to practice before the Supreme Court of the United States, and that he is attorney for Edmond J. Hamilton and John L. Datenhoff, Appellants in the matter entitled "Edmond J. Hamilton and John L. Datenhoff, Appellants versus John J. McKeithen, Governor of the State of Louisiana, Appellee," docket No. 1046, October Term, 1969 of the Supreme Court of the United States; that as attorney for said appellants affiant on December 24, 1969, twelve (12) days before the expiration of the ninety (90) day period for docketing the appeal, directed a letter of transmittal to the Clerk of the Supreme Court of the United States together with a check in the amount of $100.00 for costs; that said letter and check were placed in the shipping box with the certified record, consisting of two volumes, which had been received from the Louisiana Supreme Court together with one signed copy and thirty-nine (39) additional copies of the jurisdictional statement; that said shipping box was securely sealed with pre-glued brown sealing paper and wrapped with heavy cord, and was properly addressed to the Supreme Court of the United States, Supreme Court Building, Washington, D.C.; that at about 4:45 P.M., on December 24, 1969, affiant left his office at 1730 Main Street, Baton Rouge, Louisiana, en route to the United States Post Office which was located some ten (10) blocks away; that affiant arrived at the Post Office shortly after the closing time; affiant thereupon utilized the self-service mailing facili-

ties at the Post Office, weighed the package, affixed sufficient postage, obtained a vended postal insurance record for third class mailing, and placed the box in the inside package mailing drawer in the Post Office; that affiant on January 7, 1970, not having received any acknowledgment from the Clerk of the United States Supreme Court, called the Jurisdictional Statement Docketing Department in the Clerk's Office of the United States Supreme Court; that affiant talked to one Mrs. Lazowski for twenty (20) minutes; that affiant was informed that the record and jurisdictional statement had not been received at the Clerk's office, nor had the matter been docketed; that on January 8, 1970, affiant received a call from the said Mrs. Lazowski stating that the record and thirty-nine copies of the jurisdictional statement had been received in a damaged condition with a notation stamped thereon, "Damaged in the Mail"; that affiant at that time requested that the case be docketed, if possible, and stated that a supplemental jurisdictional statement would be forwarded at the earliest possible date to explain the circumstances concerning the mailing of the transcript and jurisdictional statement.

C. Alvin Tyler

SWORN TO AND SUBSCRIBED before me, on this

day of _____, 1970.

Notary Public

PROOF OF SERVICE

I, C. ALVIN TYLER, one of the attorneys for EDMOND J. HAMILTON and JOHN L. DATENHOFF, appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the _____ day of _____, 1970, I served copies of the foregoing Supplemental Jurisdictional Statement on the several parties to this appeal, by mailing copies in duly addressed envelopes, with first class postage prepaid, as follows:

To: Jack P. F. Gremillion, Attorney General of the State of Louisiana, of counsel for appellant, John J. McKeithen, Governor of the State of Louisiana, State Capitol, Baton Rouge, Louisiana

To: Kenneth C. DeJean, Special Counsel, of counsel for John J. McKeithen, Governor of the State of Louisiana, Office of the Attorney General, State Capitol, Baton Rouge, Louisiana

To: Willie D. Mayor, Assistant Attorney General, of counsel for appellant, John J. McKeithen, Governor of the State of Louisiana, Office of the Attorney General, State Capitol, Baton Rouge, Louisiana

To: Sam H. Jones, G. Allen Kimball and William M. Nolen, Attorneys for appellant, John J. McKeithen, Governor of the State of Louisiana, and attorneys for intervenor-appellant, American Rice Growers Cooperative Association of Lake Charles, Louisiana, Jones, Kimball, Harper, Tete & Wetherill, Gulf Na-

tional Bank Building, P. O. Box 910, Lake Charles, Louisiana 70601

To: Everett R. Scott, Jr., attorney for intervenor-appellant, Lake Charles Maritime Association, Kaufman, Anderson, Leithead, Scott & Boudreau, 117 W. Broad Street, P. O. Box 1299, Lake Charles, Louisiana 70601

To: Thomas L. Raggio, attorney for intervenor, Greater Lake Charles Chamber of Commerce, Hall, Raggio, Farrar & Barnett, Magnolia Building, Lake Charles, Louisiana 70601

To: Thomas M. Bergstedt, attorney for intervenor, West Calcasieu Chamber of Commerce, Scotfield, Cox & Bergstedt, 126 West Kirby Street, Lake Charles, Louisiana 70161

To: Meredith T. Holt, attorney for intervenors, Jesse M. Knowles, A. C. Clemmons, Jr., Harry M. Hollins, Robert G. Jones, William L. McLeod, Jr., William S. Boyd, and Conway LeBleu, Holt and Woodley, Pioneer Building, Lake Charles, Louisiana 70601

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On Appeal From the Supreme Court of the State of Louisiana

SUPPLEMENTAL BRIEF OF AMERICAN RICE GROWERS COOPERATIVE ASSOCIATION, INTERVENOR-APPELLEE, IN SUPPORT OF MOTION TO DISMISS OR AFFIRM FILED IN BEHALF OF ALL APPELLEES

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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The motion to dismiss or affirm heretofore filed on behalf of all appellees contained all of the authorities then known and relied upon by appellees in support of the motion. This supplemental brief is filed in behalf

of AMERICAN RICE GROWERS COOPERATIVE ASSOCIATION, one of the appellees, under the authority of this court's Rule 16, Paragraph 5, to call attention to a new case not available at the time of the filing of the motion. It is submitted that the case of *Shapiro* v. *Doe*, — U.S. —, 90 S.Ct. 641, decided by this Honorable Court on January 26, 1970, is determinative of the issue before the court on the motion to dismiss.

In *Shapiro*, the time limit for docketing the case expired November 1, 1969, which was a Saturday. The following day, November 2, 1969, was a Sunday. On the next day, November 3, 1969, a Monday, the case was in fact docketed by the appellants. This Honorable Court dismissed the appeal in the *Shapiro* case because the case was not docketed within the time prescribed by Rule 13.

In the instant proceeding the delay for docketing the case expired on January 6, 1970. January 6, 1970 was a Tuesday, and thus a judicial day on which appellants could have docketed the case, but did not do so. The following day, January 7, 1970, was a Wednesday, also a judicial day on which appellants could have attempted to docket the case, but did not do so. The case was not docketed until Thursday, January 8, 1970.

It can be seen that appellants were two days late docketing the case in this proceeding which is the identical period by which the appellants were late in the *Shapiro* case. Moreover, the appellants in this case did not have the excuse that the two days immediately preceding the late docketing were a Saturday and Sunday. Since the *Shapiro* case was properly dismissed, it is manifestly obvious that the appeal in this case should likewise be dismissed.

Should this court choose to overlook appellants' failure to timely docket the case, the appeal should nevertheless be dismissed (or the judgment below affirmed) because of the unsubstantiality of the questions presented, for the reasons and under the authorities set out at length in the motion to dismiss or affirm.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 1,046

EDMOND J. HAMILTON and
JOHN L. DATENHOFF,

Appellants,

versus

JOHN J. McKEITHEN, GOVERNOR OF THE STATE OF LOUISIANA,

Appellee.

On Appeal from the Supreme Court of the State of Louisiana

PETITION FOR REHEARING ON BEHALF OF EDMOND J. HAMILTON AND JOHN L. DATENHOFF, Appellants

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PETITION FOR REHEARING ON BEHALF OF EDMOND J. HAMILTON AND JOHN L. DATENHOFF, Appellants

TO THE HONORABLE SUPREME COURT
OF THE UNITED STATES:

Comes now EDMOND J. HAMILTON and JOHN L. DATENHOFF, the appellants in the above entitled cause, in which judgment was rendered by this Court dismissing the

6.

In the present case there can be no question with respect to the fact that the private organizations which submit panels of names to the Governor are not elected consistent with the commands of the Equal Protection Clause, and, thus, the appointment of governmental officials having broad governmental and administrative powers from the panels submitted by the special groups is likewise not consistent with the commands of the Equal Protection Clause, as the duly qualified electors of the area over which the Port Commission exercises its jurisdiction, and who are most directly concerned and affected by the decisions of the board, have absolutely no voice in the selection of four (4) of the five (5) members of the board. Only one (1) vacancy on the board under the provisions of Article XIV, Section 30.2(b) of the Louisiana Constitution is filled by a panel submitted by State Senators and Representatives of Calcasieu Parish, all of whom are duly elected officials entitled to submit such a list.

7.

Petitioners further show that this is an unjustified discrimination with respect to the selection of these public officials, and is contrary to the principle of representative government.

8.

The following quotation from *Avery v. Midland County Texas*, 390 U.S. 474, 88 S. Ct. 1114 (1968), is particularly applicable here:

"The Equal Protection Clause reaches the exercise of state power however manifested, whether exercised directly or through subdivisions of the state. Thus, the prohibitions of the Fourteenth Amendment extend to all action of the state denying equal protection of the laws, whatever the agency of the state taking the action. . . . Cooper v. Aaron, 358, U.S. 1, 17, 78 S. Ct. 1401, 1049 3 L. Edition 2d 5 (1958)."

9.

In the present case although an appointive rather than elective process is being questioned, it is clear that the method of appointment is not consistent with the requirements of the Equal Protection Clause; that a substantial Federal question is presented, and that this Court should grant appropriate relief.

WHEREFORE, upon the foregoing grounds, it is respectfully urged that this petition for a rehearing be granted, and that the decree of this Court entered on March 16, 1970, be reversed and set aside; that this Court should thereafter give plenary consideration to this case to resolve the important issues herein presented, with briefs on the merits and oral argument, and a final decision by this Court.

Respectfully submitted,

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PROOF OF SERVICE

I, C. ALVIN TYLER, one of the attorneys for EDMOND J. HAMILTON and JOHN L. DATENHOFF, appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the _____ day of _____, 1970, I served copies of the foregoing Petition for Rehearing on the several parties to this appeal, by mailing copies in duly addressed envelopes, with first class postage, as follows:

To: JACK P. F. GREMILLION, Attorney General of the State of Louisiana, of counsel for appellee, John J. McKeithen, Governor of the State of Louisiana, State Capitol, Baton Rouge, Louisiana.

To: Kenneth C. DeJean, Special Counsel, of counsel for John J. McKeithen, Governor of the State of Louisiana, Office of the Attorney General, State Capitol, Baton Rouge, Louisiana.

To: Willie D. Maynor, Assistant Attorney General, of counsel for appellee, John J. McKeithen, Governor of the State of Louisiana, Office of the Attorney General, State Capitol, Baton Rouge, Louisiana.

To: Sam H. Jones, G. Allen Kimball and William M. Nolen, Attorneys for appellee, John J. McKeithen, Governor of the State of Louisiana, and attorneys for intervenor-appellee, American Rice Growers Cooperative Association of Lake Charles, Louisiana, Jones, Kimball, Harper, Tete & Wetherill, Gulf National Bank Building, P. O. Box 910, Lake Charles, Louisiana 70601.

To: Everett R. Scott, Jr., attorney for intervenor-appellee, Lake Charles Maritime Association, Kaufman, Anderson, Leithead, Scott & Boudreau, 117 W. Broad Street, P. O. Box 1299, Lake Charles, Louisiana 70601.

To: Thomas L. Raggio, attorney for intervenor, Greater Lake Charles Chamber of Commerce, Hall, Raggio, Farrar & Barnett, Magnolia Building, Lake Charles, Louisiana 70601.

To: Meredith T. Holt, attorney for intervenors, Jesse M. Knowles, A. C. Clemmons, Jr., Harry M. Hollins, Robert G. Jones, William L. McLeod, Jr., William S. Boyd, and Conway LeBleu, Holt and Woodley, Pioneer Building, Lake Charles, Louisiana 70601.

I further certify that this petition for rehearing is presented in good faith and not for delay.

Attorney for Edmond J. Hamilton and John L. Datenhoff, Appellants
1730 Main Street
Baton Rouge, Louisiana

SUPREME COURT OF THE UNITED STATES

October Term, 1969

HAMILTON ET AL. *v.* McKEITHEN, GOVERNOR

APPEAL FROM THE SUPREME COURT OF LOUISIANA.

No. 1046. Decided March 16, 1970

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.